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Office of Administrative Law Judges
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Issue Date: 02 June 2004

Case No.: 2002-STA-31

In the Matter of

BEVERLY CALHOUN,
Complainant,

v.

UNITED PARCEL SERVICE,
Respondent.

Appearances:

Paul Taylor, Esq.
For Complainant

Brian D. Edwards, Esq.
Theresa Hammond, Esq.
For Respondent

Before: Fletcher E. Campbell, Jr.
ADMINISTRATIVE LAW JUDGE

RECOMMENDED DECISION AND ORDER

This proceeding arises from a claim filed by Beverly Calhoun ("Complainant") under the Surface Transportation Assistance Act ("STAA" or "the act"), 49 USC 31105, against United Parcel Service ("UPS" or "Respondent"). Calhoun was employed by UPS from July 20, 1970 until December 31, 2003, when he retired. He began working as a feeder driver for UPS in about 1978 and worked in that capacity until his retirement (JX 84 at 48).¹ Calhoun has never been a truck driver for any firm other than UPS (Tr. 292-3). He usually operated a truck tractor, which consisted of two trailers and a dolly. This combination is called a feeder set (Tr. 29).

¹ The following are references to the record:

CX – Complainant's exhibits;
RX – Respondent's exhibits;
JX – Joint exhibits; and
Tr. – Transcript of the hearing.

The problem between Complainant and UPS arose because Calhoun, who is an unusually safe driver (Tr. 29, JX 2), repeatedly insisted on exceeding UPS standards in performing pre-trip safety inspection procedures. The extra time he would take cost UPS money (Tr. 665-8). UPS took some steps to try to shorten Calhoun's start time (JX 6 at 6-7). Then, Calhoun filed a complaint under the STAA in 1998. After a hearing in 1999, I issued a recommended decision and order recommending denial of Calhoun's complaint on the grounds that Respondent had taken no actionable adverse action against him (JX 6). The Administrative Review Board affirmed my decision (JX 7).

However, since the 1999 hearing on Calhoun's previous claim, UPS has gone further and suspended him from work without pay. In two instances, Complainant was actually terminated although subsequently reinstated (Tr. 162-8, 191-2). Therefore, there is no longer any question that UPS has taken actionable adverse action against him.

Complainant filed the present claim in 2001 seeking abatement of violations and expunging of unfavorable personnel records, along with other relief (JX 11). He now seeks payment of actual damages for lost pay due to allegedly impermissible disciplinary actions as well as damages for emotional distress caused by the adverse actions (Tr. 10).

A second formal hearing was held in this case before me on November 4, 5, and 6, 2003 at Greensboro, North Carolina. At the 2003 hearing, the parties jointly offered exhibits JX 1-84; Complainant submitted exhibits CX 1-12; and Respondent proffered RX 1-7. All of these were, pursuant to my prior order, admitted into evidence subject to post-hearing motions to strike.

Following the hearing, the parties did file motions to strike some documents. As a result, I struck exhibits RX 2, CX 4, CX 5, CX 7, and CX 8, which, thus, are not now in evidence. All other proffered exhibits are in evidence.

The findings and conclusions which follow are based on a complete review of the record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUES

1. Were Calhoun's pre-trip inspections "protected activity" under the STAA?
2. Has Calhoun made a prima facie case that, because he engaged in protected activity, he was subjected to adverse employment action?
3. Has UPS offered a legitimate, non-discriminatory explanation for any adverse employment action?

4. If Respondent has a legitimate explanation for any of the adverse actions, would it have taken the action anyway if the protected activity had not taken place?
5. What damages are appropriate?

STIPULATIONS

Although the parties did not enter into any formal stipulations at the 2003 hearing, they did agree at the 1999 hearing that the parties were both covered under the STAA, as was Calhoun's claim. I so found in 1999 and so find now (JX 6 at 2).

SUMMARY OF TESTIMONY

A. Testimony of Beverly Calhoun

Beverly Calhoun is a feeder driver with UPS. He delivers double trailers to Carnesville, Georgia and back four days a week (Tr. 28). He received a safe-driving award in July of 2002 for 32 years of driving with no unavoidable accidents (Tr. 29). He attributes his safe driving record to properly checking his equipment before operating it. The equipment consists of two trailers, a dolly and a tractor (Id.). In the last 20 years, he has had one breakdown due to engine problems on the tractor and none due to faulty equipment. This is because he completes a thorough equipment check on each new piece (Tr. 30-1).

Calhoun travels four days a week to Carnesville, Georgia, where he meets a driver from Alabama. They switch trailers, and he returns to the UPS terminal in Greensboro with the Alabama trailers (Tr. 31-2). These trailers normally originate from Phoenix, Arizona or Jackson, Mississippi (Tr. 32).

Vehicle inspections completed by Calhoun go beyond that required by UPS. He checks the steering rod, the drag links, and the tie rod (Tr. 33). He wipes down the reflective tape on the trailers and the tail lights. He also pulls the double trailers apart to check the connections (Tr. 34-5). The steering rod is a long metal rod that connects the steering wheel with the gearbox. On the rod, there is a universal joint that is flexible. Too much flexibility can cause this joint to break, resulting in loss of steering (Tr. 36-7).

A drag link is a metal rod that operates the wheels. This link should not be loose and must be replaced if it is (Tr. 38). Calhoun and other truck drivers share information about equipment problems to avoid similar situations (Tr. 40).

Calhoun takes the double trailer sections apart to check the "fifth wheel," a coupling device. The fifth wheel is a horseshoe-shaped coupler intended to connect to

the kingpin latch underneath the front of the second trailer (Tr. 46-7). He checks to make sure that the fifth wheel is lubricated properly and that there are no foreign objects within its jaws (Tr. 48). If there is not proper lubrication, it makes steering difficult, and Calhoun cleans out the old grease and replaces it with new, clean grease (Tr. 53).

He inspects hoses by running his hands down the hose to check for knots, bulges, cuts or flat spots (Tr. 54-5). With 120 pounds of air running through the hose, a weak spot can cause an accident or damage to the truck (Tr. 56). It is necessary to touch the hoses, as some damage cannot be detected by the eye (Tr. 59). Calhoun has found numerous pieces of hose that have been damaged, and he identified some samples at the hearing (Tr. 57-60). Most damage is found on the backside, where it has been pinched or cut (Tr. 64). These lines supply air to work the brakes (Tr. 66).

In June of 1999, Calhoun began hand checking the lug nuts on the tires as part of his vehicle inspection (Tr. 70). He checks the outside of the tire for cuts, bulges or dry rot. By the time lug nuts are rust streaked, they are extremely loose and should have been tightened sooner (Tr. 71).

Calhoun checks the springs, wheel seals, U-bolts, slack adjuster rods, brake chambers, S-cam rods, and the inside of the rear tires by looking under the trailers from the back (Tr. 75-6). By checking the trailers in this manner, Calhoun has found cracks between the U-joints and broken dolly springs (Tr. 76-7).

The double trailers are not attached to tractors when they are assigned to Calhoun (Tr. 82). Pre-assembled sets are put together by shifters, yard workers who move the trailers from point to point (Tr. 83). Calhoun was unsure of the shifters' inspection habits; so, normally he would take the assembled trailers apart (Tr. 84). He was fired twice for taking the doubles apart in order to make sure they were put together correctly. He has also been known to take doubles apart when picking up loads at the turnaround (Tr. 84-5), but he does not do this as normal procedure because those doubles are put together by experienced drivers and have been hauled (Tr. 86).

Don Allen is Calhoun's direct supervisor. Allen's supervisor is Harry Wolfe, the feeder manager (Tr. 87-8). On June 26, 2001, Calhoun had an on-the-job supervision ride with Allen, who accompanied him through his entire work day, including his vehicle inspection (Tr. 89). That morning, the double had not been put together; so Calhoun attached the doubles himself. After inspecting the front trailer, he checked the dolly and found the latch to be malfunctioning (Tr. 90). Allen told him to hook the dolly up anyway and attach the second trailer, but, when he tried to uncouple the trailer and reset it, he was unable to (Tr. 92-3). They decided to take the trailer to the shop to be checked by a mechanic (Tr. 94).

During the supervision ride, Allen observed Calhoun wipe down the dash, steering wheel, gear shifter and buttons. He does this while the air builds to 100-120 pounds within the brake lines (Tr. 97-8). He also checks the driver log book when he gets into the tractor (Tr. 99). The report filed by Allen stated that Calhoun completed an

incorrect brake check because he backed up to the front trailer and pulled against it to check for free-rolling wheels (Tr. 100-1). UPS policy states that brakes are checked by driving across the yard at ten miles an hour and applying the brakes (Tr. 102).

Calhoun and Allen drove the double to the shop to have the fifth wheel coupling checked by the mechanics (Tr. 102). Larry Fargis, Brian Massey, and Percy Starr checked the coupling and found some broken bolts (Tr. 103). Massey and Starr had to use pry bars to separate the dolly and coupling device, and the dolly was put aside for repair (Tr. 104). Starr selected a new dolly for Calhoun's double. However, the quick release button didn't work, and the brakes were out of adjustment (Tr. 105-7). Calhoun had to bleed the air off the dolly so that it could be moved freely without the wheels locking up (Tr. 106). In doing so, he noticed that the quick release button didn't work and that the right brake lining was raised off the drum (Tr. 107). This could cause substantial problems because it would keep the brakes from working properly.

Allen stated in his report that Calhoun had no sense of urgency and didn't move fast enough (Tr. 109). Calhoun believes that he can't just walk around the truck and scan the necessary equipment; he needs to check everything thoroughly. He goes to the maintenance shop almost daily to have things fixed (Tr. 110). No one in the maintenance shop has ever told him that he was bringing illegitimate complaints or shouldn't bring things in.

After completing his assessment, Allen advised Calhoun not to touch air lines the following day (Tr. 112). That very day, while completing his vehicle inspection, Calhoun found knots in both short airlines and dolly wheels which wouldn't move properly (Tr. 113). Allen also advised Calhoun that "touching hands on everything is not necessary nor recommended" (Tr. 117). Calhoun would never have found the knots in the airlines without touching the hoses. Calhoun was given a one-day suspension for touching the steering rod, drag link and a couple of lug nuts (Tr. 118-20).

During the meeting in which Calhoun was suspended, Allen advised him that he would have to follow UPS methods during his inspections (Tr. 121). Calhoun also received a warning letter for touching the steering and lugs, after which he resumed his vehicle inspection. Allen and Randall Williams, a shop steward, stood with Calhoun and watched him finish his inspection (Tr. 122). Calhoun continued to touch lug nuts on the tractor and checked the equipment write-up book. He sprayed down the steering wheel and gear shift lever, at which time Allen asked Calhoun to stop his inspection because he wasn't adhering to the UPS methods outlined by Allen (Tr. 123-4). This is why Calhoun was given a one-day suspension.

The following day, Allen accompanied Calhoun during his vehicle inspection (Tr. 128). Calhoun discovered an air leak at the rear valve of the trailer using UPS inspection methods. However, he was written up for improperly scanning equipment. The UPS method states that Calhoun is supposed to walk around the truck, and, if he doesn't hear an air leak or see anything during a quick inspection, he is not to touch anything (Tr. 130). Calhoun asked Allen to be left alone during his inspection because

he wanted to check the air lines and because the truck is his responsibility from the moment he picks up the keys in the morning until he turns them in at night (Tr. 131).

On July 5, 2001, Allen once again accompanied Calhoun during his pre-trip inspection of his vehicle (Tr. 133). Calhoun noticed an oil deficiency in the glad hands (Tr. 137-9). On July 6, 2001, Tom Hope, a shop steward, also participated in the pre-trip inspection (Tr. 141). Calhoun noticed that there was a problem maintaining air pressure at 120 pounds. The pressure seemed to fluctuate between 75 and 95 pounds, which could indicate a number of problems such as a leak in the spitter valve or a seal problem in the glad rings (Tr. 142-3). The truck was taken to the shop and the leak fixed. Calhoun didn't think that he completed a proper inspection and felt rushed through it by Allen and Hope (Tr. 145).

Calhoun was given a three-day suspension on July 10, 2001 by Allen for "not scanning properly" (Tr. 146-7). He was supposed to move around the truck and not slow down to check anything unless he heard an air leak (Tr. 147). Calhoun stopped to look under the cab door area and again to look under the rear of the truck (Tr. 151). He also drained all the air off the dolly, which UPS deemed not to be necessary, and rubbed his hands up and down the lines (Tr. 153-4). Calhoun tried to hurry through his inspection and later found that he had missed a bad knot on the short red line (Tr. 155).

On September 6, 2001, Calhoun had a problem with the brakes and dropped to one knee to check them. Despite finding a problem, Calhoun was terminated on September 7, 2001 for once again failing to comply with UPS inspection methods (Tr. 162-8).

Calhoun went back to work for UPS and on October 30, 2001 found his doubles that were to be attached, but the rear trailer doors were open and still being loaded (Tr. 171). He pulled the trailers apart to check the dolly and put them back together after finding nothing wrong with them. Allen came out of his office and asked Calhoun to come in for a meeting (Tr. 172-3). Allen asked Calhoun why he separated his doubles and reassembled them. Calhoun answered that that was the only way he could check everything (Tr. 174). Calhoun was told explicitly not to separate the doubles after they had been built and was again discharged.

He continued to work for a short time following his discharge until his meeting with Terry Thomas, a loss-prevention employee (Tr. 175-6). Thomas accused Calhoun of stealing new and used parts. However, Calhoun was only taking used hoses home for evidence at his hearing (Tr. 177). Calhoun was also taking new parts to Gary Tanner at the turnaround point to fix broken or malfunctioning equipment. In doing so, Calhoun had the permission of Rick Deffendorf (the shop mechanic and supervisor) (Tr. 178-80). During a January 22, 2002 meeting, Bill Robinson, the shop steward from the maintenance department, said that he had a reliable source who was aware that Calhoun was taking parts but was unsure whether he was selling them (Tr. 185). Calhoun was told to bring any parts he had back to work, and they would be made

available to him if he needed them for his hearing. He was taken out of service that day and sent home (Tr. 186).

On January 24, 2002, Calhoun returned to work and met with Bill Robinson and Harry Wolfe. He was told that in the future parts would have to be tagged and given to a manager to hold as evidence (Tr. 186-7). Calhoun was invited to a dinner for the circle of honor drivers, drivers who had 25 years or more of safe driving of UPS vehicles (Tr. 188). He declined to attend this dinner because management was hypocritical for talking about safety yet prohibiting Calhoun from completing proper safety checks (Tr. 189).

Calhoun was terminated yet again on May 7, 2002 for pulling apart doubles that had already been set up (Tr. 191-2). He filed a grievance and was ultimately suspended for only 20 days (Tr. 194).

Calhoun has been under extreme stress at work and has been taking Celexa, an anti-depressant, every day (Tr. 289). He has consulted a counselor, who recommended that he avoid disagreements with management. These consultations were paid for by his teamsters insurance (Tr. 290). Also, he hasn't been sleeping well.

Calhoun has never driven a truck for any company but UPS; so he isn't familiar with safety practices at other companies (Tr. 293). However, Calhoun believes that he should be able to check his equipment in any way he sees fit as long as he also follows UPS procedure (Tr. 295). He has contacted numerous federal agencies, filed multiple OSHA claims and written many letters to politicians and governmental officials (Tr. 307-8). In response to a letter written to Congressman Harry Coble, the DOT conducted two separate inspections of the UPS Greensboro facility and found no merit to Calhoun's complaints (Tr. 313-4).

In addition to complaints and letters written to outside agencies, Calhoun has also filed approximately 56 grievances (Tr. 323-4). Several of his grievances were submitted to a grievance panel in September of 2002. All of them were dismissed (Tr. 327).

Calhoun has been instructed many times over the last 15 years to reduce the time he takes to complete his pre-trip routine (Tr. 336). These requests began in 1986, when Calhoun was advised to cut his time by 15 minutes (Tr. 337-8). He was told that he was the most over-allowed feeder driver at UPS. Therefore, he was told, someone would be assigned to work with him to reduce his start-work times (Tr. 341). During his deposition, Calhoun admitted that he has done nothing to reduce the time he spends doing his pre-trip inspections (Tr. 342-3). He also stated that pre-assembling doubles would eliminate many problems and time issues; yet he takes the doubles apart to check each coupling (Tr. 348-9).

B. Testimony of Bill Puckett

Billy Puckett lives in Eden, North Carolina and graduated from High Point University. He began working for UPS in September of 1986 as a package car driver and became a tractor trailer driver in 1989 (Tr. 447-8). He attended training two weekends in a row and learned DOT regulations, proper pre-trip inspection procedures, post-trip procedure, on-the-road training and keeping a the vehicle centered in a lane. At the end of his training, he took a written test (Tr. 448-9).

Puckett drives both combination doubles and single trailers (Tr. 449). Approximately 50% of the time, he finds the sets built in advance. During his pre-trip inspection, Puckett touches the hoses to check them, looks under the back of the trailer at the brake chambers and springs, touches the steering linkage and lug nuts if they are rusty, and inspects the engine compartment (Tr. 450-2). Puckett also checks his equipment at the turnaround point, whether in Raleigh or Hickory (Tr. 454).

Puckett, who is also a union steward, recalled a conversation he had had with Wolfe about an accident that had occurred. Wolfe stated that "if more drivers would do a turnaround pre-trip like Calhoun then this [accident] could have possibly been prevented" (Tr. 455-6). Puckett suggested to Wolfe and Sherman that Calhoun's doubles be left unattached, but neither of them responded to this suggestion (Tr. 457).

Puckett has never known a driver to be disciplined for improper pre-trip inspections (Tr. 458-9). During his pre-trip inspections, he also wipes down the steering wheel and gear shift because the employees who fuel the tractors in the evenings get grease on the equipment (Tr. 460). He does this while he is waiting for air pressure to build in the brake lines (Tr. 461). Despite being told not to touch the air lines during his pre-trip inspection, he does so anyway (Tr. 463).

C. Testimony of Jeffrey Shultz

Jeffrey Shultz graduated from Forsyth Tech with a degree in fleet or heavy truck maintenance (Tr. 477). He worked for Salem Leasing after graduation as a mechanic for a couple of years, then went to work for D.C. Billings in Winston-Salem in the same position (Tr. 478). Shultz was next employed by Mack Trucks and in 1984 was hired by UPS as a mechanic. He worked in that position for three years, then was given a management job in the automotive department, which he held for 15 years (Id.). He currently owns a fleet or breakdown service business, Shultz Mobile, and continues to work on heavy equipment (Tr. 479).

As a manager at UPS, Shultz oversaw day-to-day maintenance of the tractors and trailers, scheduled trailer and tractor mechanics for work, and made sure that all maintenance was done on an expedited basis (Tr. 479-80). As the fleet supervisor at the Greensboro hub, he came into daily contact with feeder drivers if they had any problems with their equipment (Tr. 481). While working the day shift, Shultz saw Calhoun regularly when the latter brought in equipment to be red tagged (Tr. 483). He

cannot recall any time when Calhoun came to the maintenance shop with an equipment problem that was not justified (Tr. 485). It is very important to company safety standards for drivers to perform thorough pre-trip inspections (Tr. 502).

D. Testimony of Thomas Hope

Thomas Hope has been employed at UPS for 28 years (Tr. 507). He began there in September of 1975 working in package cars for approximately three years. Then he became a feeder driver in Charlotte for eight years. In 1986, Hope transferred to the Greensboro shop. He has been pulling doubles for approximately 20 years (Tr. 508). Currently, he works on an "on-call" basis and does not drive one specific route.

Hope conducts daily vehicle inspections both pre-trip and at the turnaround point (Tr. 510-1). He touches the air hoses on the tractor, looks underneath the trailers and wipes down the reflector tape. Normally, he connects the doubles himself, but, if they're already put together, he does not unhook them unless he finds something wrong with them (Tr. 511-2).

In July of 2001, Hope was present at a yard vehicle inspection with Calhoun and Allen (Tr. 513). Allen stayed right next to Calhoun the entire time and gave him no space in which to move. Allen seemed antagonistic and almost hateful when speaking to Calhoun and, despite the air pressure not reaching the correct number, told him to leave the yard anyway (Tr. 514-5). Allen pressured Calhoun to hurry through the pre-trip inspection (Tr. 532-6).

E. Testimony of Joseph S. Lemmond

Joseph "Sam" Lemmond, a circle-of-honor driver, has been employed at UPS since 1974 and became a feeder driver in August of 1978 (Tr. 554-5). He currently drives doubles to Carnesville, Georgia every day, the same route as Calhoun. He performs a vehicle inspection each morning and again at the turnaround point. Lemmond believes that it is important to touch the hoses because it's impossible to see the back sides to check for flat spots (Tr. 555). He also touches the fan belts and steering linkage in the engine compartment.

It is also important to check the fifth wheel; Lemmond has to grease it at least twice a week (Tr. 561-2). For a while, he would pull the doubles apart to check the dolly but quit after being instructed not to do so (Tr. 562-3). He would prefer to put his doubles together himself in order to check the fifth wheel and king pin. Lemmond wipes down his steering wheel and gear shift while waiting for air pressure to build in the brake system (Tr. 566).

Lemmond has known Calhoun since 1997 and has noticed some changes in his disposition (Tr. 565-6). He seemed to have lost some weight, and his hair is graying. Allen told Lemmond that the latter is among the most over-allowed drivers at UPS (Tr. 567-8).

F. Testimony of Randall Williams

Randall Williams has been employed by UPS for 18 years and has been a feeder driver pulling doubles for 12 years (Tr. 574-5). He has been a shop steward for four years, handling grievances for union employees. He is currently a vacation cover driver with no permanent route. Williams completes a pre-trip inspection just like all other drivers and touches air hoses, lug nuts, steering rods, belts and glad hands (Tr. 576-7).

On June 28, 2001, Williams participated in a meeting with Calhoun and Allen. Williams observed Calhoun begin his pre-trip report and heard Allen tell Calhoun not to touch items such as the lug nuts (Tr. 578-9). When Calhoun would continue to touch items that Allen told him not to touch, Allen said that he would issue a warning letter for failure to follow instructions (Tr. 579). The pre-trip inspection was not completed because Calhoun began to clean the windshield. During the meeting in which Calhoun was issued a warning letter, he was also told that he was taking too long in the yard (Tr. 586). Calhoun was not complying with Allen's instructions because he was wiping down the cab instead of doing the required in-cab checks (Tr. 588).

G. Testimony of Bill Robinson

Bill Robinson was a plant maintenance mechanic at UPS for 33 years; he retired on September 1, 2003 (Tr. 599-600). He worked on building equipment such as conveyor belts and electrical wiring. He was also a shop steward for 30 years (Tr. 600).

Robinson participated in a meeting held with Calhoun, Harry Wolfe and Terry Williams, the loss prevention manager. A reliable source accused Calhoun of taking UPS parts home with him (Tr. 601). Calhoun admitted to taking repair parts to the turnaround point so equipment could be repaired there and said that he had some small pieces of hose and such in his locker. He was upset that he had been accused of theft after working for the company over 30 years as a loyal employee (Tr. 602). Williams asked Calhoun to write a statement and, after contacting his attorney, Calhoun complied. Calhoun was suspended and sent home after the meeting but came back in that very day and was put back to work (Tr. 603-4).

Robinson also participated in a meeting on May 8, 2002 with David Sherman, Harry Wolfe and Calhoun (Tr. 605). During the meeting, Sherman advised Calhoun that, if he broke another double set apart, he would be escorted to the gate (Tr. 606).

H. Testimony of David Sherman

David Sherman, the feeder division manager for West Carolina, has been employed by UPS for over 23 years (Tr. 609). The feeder division manager is responsible for the coordinated movement of all the loads and packages within the division. The Greensboro facility is the fifth largest facility in the country and handles

time-sensitive packages (Tr. 610-11). Sherman's job is to make sure that any loads, including unscheduled loads, are moved on a timely basis.

The load schedules are set up by times. Drivers must meet at certain points at certain times to transfer loads and make sure they reach their destination by a specific time (Tr. 611-12). Sherman also manages a group of employees called on-road managers and on-road supervisors. They are responsible for the day-to-day activity, including training drivers and supervising the current drivers. There are approximately 400 feeder drivers in the West Carolina area (Tr. 613-14).

UPS managers conduct on-job supervision rides at least annually with every driver. A supervisor rides with a driver and spends the day with him or her to make sure that all safety precautions are being followed and to assess the performance of the driver (Tr. 614-15). There is also annual compliance training on hazardous maintenance of a safe work environment. All UPS feeder managers and anyone who may train a driver are sent to driver training school (DTS), an intense three-week school, to learn to teach employees how to drive as well as how to teach others effectively (Tr. 616).

A person who builds doubles reports directly to the dispatcher, who gives him his assignment to build doubles. They are given hours' worth of work at a time and, after completing each assignment, report back to the dispatcher for a new one (Tr. 629-30). Doubles are built on an availability basis. The heaviest trailer is always the lead trailer, and they have to be available. The pre-assembled doubles are set up to save time and get the drivers off the yard quicker (Tr. 631). It is also more cost effective and gives the driver a little extra time to make his turnaround point (Tr. 633).

As the feeder division manager, Sherman is responsible for all service failures that occur within the scope of his operation. He watches everything closely to identify the cause of each service failure (Tr. 650-3).

Calhoun was frequently late to the twilight sort of packages, which caused service failures and operational concerns (Tr. 655). From January to June of 2002, Calhoun was late getting back for the twilight sort 60 percent of the time. Unfortunately, Calhoun cannot be placed on a less time-sensitive route due to his union seniority (Tr. 658). Extending his time is not an option either as all the routes are intertwined, and the packages are time sensitive (Tr. 659). It was costing UPS large sums of money to run last minute shuttles because Calhoun was late - not to mention overtime for Calhoun as well as the sorters (Tr. 665-8).

Finally, a termination letter was sent to Calhoun because, despite every effort by management, he made no efforts to rectify the situation (Tr. 674). He had previously received a warning letter and two other suspensions. Sherman believed that nothing he did to try to change Calhoun's attitude was taken seriously, nor did he show concern about his service failures in general (Tr. 675). The shop stewards agreed to speak with Calhoun about his behavior (Id.).

Calhoun was instructed on numerous occasions not to separate his doubles as part of his normal pre-trip routine (Tr. 681). He continued to disobey his superiors and, in October of 2001, was discharged. Calhoun was reinstated and terminated again in May of 2002 for separating the doubles (Tr. 683-4). Equipment at the Greensboro hub does not sit for more than 24 hours at any time. Calhoun does not take the doubles apart at the turnaround point, and Sherman does not think that there is any reason to take them apart at the hub unless you can see a problem (Tr. 685-6).

Every time Calhoun gets back to the hub at 8:00 p.m. or after, there is a greater chance of service failure (Tr. 739-40). He arrives back after 8:30 p.m. at least 60 percent of the time, and this costs the company money. Calhoun spends too much time doing pre-trip inspections, which puts him behind in meeting his time goals (Tr. 742-3). Calhoun has never been disciplined for finding equipment problems. If Calhoun had tried to follow his supervisor's instructions and not been belligerent or defiant, some things could have been overlooked (Tr. 746). However, because of the severity of Calhoun's pre-trip inspection problems, his poor attitude, and the frequency of his service failures, discipline measures were necessary (Tr. 747).

I. Testimony of Larry Fargis

Larry Fargis has been employed at UPS in Greensboro for 22 years (Tr. 762-3). He worked as a package car mechanic for approximately 15 years and then became a feeder mechanic, working on tractors and trailers. For the last five years, Fargis has worked from 5:00 a.m. until 2:00 p.m. Calhoun is the most frequent visitor to the UPS shop with equipment defects such as air lines, air leaks, lights, springs and wheel seals (Tr. 764). The items brought to the shop by Calhoun have always needed repair.

When Fargis is checking equipment, he not only looks at the parts but also touches them (Tr. 765-6). He does not believe that the hoses can be checked adequately without running one's hands down them (Tr. 767). The maintenance program at UPS is excellent (Tr. 768).

J. Testimony of Don Allen

Donald Wayne Allen has been employed at UPS since March 25, 1973. He was hired as a part-time loader and later that same year became a shifter of equipment on the yard (Tr. 775). He drove a package car for three years and began driving a feeder car in 1981. In 1985, Allen was promoted to a dispatcher/on-road supervisor and worked in that position for three years (Tr. 776). He next went to the Industrial Engineering Department for just over a year. Ultimately, he was reassigned to the feeders as an on-car supervisor in 1991. He has always worked in the Greensboro hub (Tr. 776).

As an on-road supervisor, Allen is responsible for training new employees, conducting feeder schools, handling all safety issues as well as payroll and personnel

records, and investigating accidents (Tr. 777). He also completes on-job supervision rides to evaluate the drivers' performance. Allen is certified through the driver training school, a three-week course which teaches students to train and evaluate drivers (Tr. 777-8). He is currently responsible for 42 drivers, of which Calhoun is one (Tr. 781). Calhoun has worked for Allen since 2000.

Since 2000, there have been several areas of concern regarding Calhoun's job performance, specifically his service failures (Tr. 784-5). On June 26, 2001, Allen went on an on-job supervision ride with Calhoun. He noted Calhoun's inefficient routine, his exaggeration of scanning procedures, and lack of urgency in touching hoses and such, which weren't necessary (Tr. 787). "Bottom line, he was just taking way too much time to do the job that he was hired to do" (Tr. 787).

Calhoun's spent too much time during his in-cab routine doing personal things, instead of productive activities, while air pressure built (Tr. 788). The in-cab routine should be handled as follows:

"Whenever you get back in the cab, the first thing you do when you sit in the seat is your exhaust and your air pressure off your brake system, building the pressure back up. Check your protection valves. During that period of time you should be checking all the other items that's in the cab, steering, horn, brake pedals, numerous other times. The way that he was doing it was when he was exhausting his air pressure, allowing his air pressure to build back up, he was doing personal items. He was taking his cleaning fluid and rag and spraying on his rag and wiping down the steering column and dash and buttons and gear shifter."

(Tr. 788). After completing these personal items, Calhoun would then begin the necessary checks, which delayed his start time.

Calhoun also spent too much time doing his visual inspection. He looked at things more than once and for too long (Tr. 789). In the engine compartment, he was touching things unnecessarily, for example, grabbing the hoses and mashing or squeezing them. He grabbed the fan and the steering linkages on the tractor wheel and also turned the lug nuts (Tr. 788-9). Calhoun also crawled under the trailer to check the spring gaps, which UPS does not require (Tr. 790).

To complete his brake check, Calhoun drives the truck at 10 mph through the yard, then pulls the hand valve down to check the trailer brakes. This checks the trailer brakes but doesn't check the entire braking system (Tr. 791). This is not proper UPS procedure (Id.).

That afternoon, Allen met with Calhoun to review the results of his on-job supervision ride along (Tr. 792-3). Allen made it clear to Calhoun that the latter needed

to reduce the time he was taking to get out of the yard (Tr. 794). Calhoun was argumentative and resisted anything Allen suggested to cut his yard time. It was clear to Allen that Calhoun would not comply with the instructions.

Allen worked with Calhoun on his start-work procedures again on June 27, 2001. On the June 26, it took Calhoun 16 minutes to complete his tractor check. On June 27, the pre-trip check took 22 minutes (Tr. 795-6). He didn't alter his routine in any way and actually increased his time by exaggerating his inspections.

On June 28, Calhoun began his pre-trip inspection the same way as before. He made no changes or alterations to his routine (Tr. 797-8). Allen stopped him halfway through and took him to the feeder office to review where things stood. Randall Williams was also present (Tr. 798). Allen explained to Calhoun that, over the past two days, he had seen no effort on Calhoun's part to comply with suggestions made by his supervisor and, due to his defiance, had no alternative but to take disciplinary action (Tr. 799).

After the meeting, Williams, Allen and Calhoun went back to the yard for Calhoun to continue his pre-trip inspection. He continued his inspection in the same manner as before, touching lug nuts, handling hoses and wiping down the interior of the cab after being told not to (Tr. 800). Allen stopped him again and asked him to step down from the cab. Calhoun was being rebellious at this point, and Allen and Williams accompanied him back upstairs to the office. Calhoun was sent home with a one-day suspension, and someone else delivered his load (Tr. 801).

On June 29, 2001, Allen completed yet another work audit of Calhoun, who seemed to improve slightly in his hand-checking of parts. However, as if to compensate for not touching things, he spent more time on his scan (Tr. 802). Calhoun also began separating the doubles, at which point Allen stopped him. Calhoun became belligerent and insisted that he needed to check the coupling devices (Tr. 802-3). At the end of his start-work routine, Allen, Calhoun, Williams and Byron Tucker met regarding his one-day suspension. It was decided that he would be taken out of work for his next scheduled work day (Tr. 804). Calhoun was advised that he needed to make some changes in his start-work routine to avoid further disciplinary action (Id.).

Allen next met with Calhoun on July 5, 2001. Allen once again supervised his start-work routine to see if the necessary changes had been implemented (Id.). Now, Calhoun began adding things to his routine as if to compensate for not touching parts (Tr. 807). On the 6th, another work audit was completed. Calhoun completed his tractor pre-trip inspection in nine minutes, his best time ever (Tr. 809).

On July 10, 2001, Allen noted in his report that Calhoun was "purposefully over exaggerating his inspections. He had no sense of urgency about running the schedule or his departure time" (Tr. 811). He did not believe in the UPS pre-trip inspection method and was going to check what he deemed necessary anyway (Tr. 821).

On October 30, 2001, Allen observed Calhoun reassembling a set of doubles. Allen asked Calhoun to stop by his office to explain why separating the doubles was necessary (Tr. 822). Calhoun stated that he just wanted to check the coupling devices despite being told many times not to separate them (Tr. 823).

In January of 2002, Allen rode along with Calhoun for an on-the-job supervision assessment (Tr. 827). Calhoun took 16 minutes to complete the tractor portion of his inspection and had reverted to his original methods of checking his equipment.

UPS trains its drivers to perform a thorough pre-trip inspection to satisfy themselves that the equipment is safe and in good working condition (Tr. 843). Some changes can be made to the UPS pre-trip check, not, however, to the extent that it causes major delays in start times (Tr. 844). Lemmond also exceeded the UPS guidelines for pre-trip inspections. Allen met with him and pointed out some areas he needed to improve on, and changes were made.

Calhoun has added certain things to his pre-trip routine which are not necessary (Tr. 849). They include touching the engine fan; crawling underneath the trailer to check the space between the springs; spraying and wiping down the dash, steering wheel, and gear shift; taking personal notes; and going through an improper brake-check routine (Tr. 850-2). Calhoun is not satisfied with UPS methods for pre-trip inspections, which leads Allen to believe that he needs additional training to improve his method and routine (Tr. 854).

Calhoun has been told not to separate doubles, but he doesn't want to rely on another driver's pre-trip inspection procedures (Tr. 877). He has been told to check around the trailer and tractor but not to disassemble (Tr. 878-9). It is not necessary to see the grease on the top of the fifth wheel if the double has been preassembled. The shifter who put the double together should have checked for this (Tr. 886-8).

K. Testimony of Terry Thomas

Terry Thomas is the UPS Southeast Region Comprehensive Health and Safety Process Manager and was the West Carolina District Health and Safety Manager from 1993 to 2002 (Tr. 897-8). As the safety manager, Thomas supervised all the health and safety activities for the district, such as injury and auto accidents, prevention activities, and compliance with regulations of agencies like OSHA and DOT (Tr. 898).

Thomas was notified by Chris Hartley at the DOT that a complaint had been lodged and that he would visit the UPS Greensboro facility to investigate. An investigation was conducted, results of which can be found in JX 24.

All accidents and incidents with UPS drivers are logged and recorded. DOT requires that three categories of accidents be recorded: 1) the vehicle is involved and has to be towed from the scene; 2) someone involved in the accident has to seek immediate medical treatment; and 3) a fatality is involved in the accident (Tr. 900-2). In

2001, the Greensboro facility ranked among the top five districts out of 60 with the lowest accident frequency (Tr. 903).

Calhoun's start-work over allowance times have been a major source of contention. However, Calhoun's over allowance in 2001 was 76 minutes versus an average of 23 minutes for all other feeder drivers (Tr. 904-5). The other drivers on his route average an over allowance of 36 minutes (Tr. 906).

L. Testimony of Harry Wolfe

Harry Wolfe has been the feeder manager for the UPS Greensboro facility since August of 2001 (Tr. 915). There are 222 feeder drivers assigned to Greensboro, and there are two feeder managers who oversee hours, schedules, training, and day-to-day operations. Wolfe met with Allen and discussed the efforts made to bring Calhoun into compliance with UPS procedure (Tr. 916).

Wolfe led an investigation when a driver named Rod Ziegler had an accident. The doubles came apart because the locking mechanism on the fifth wheel wasn't engaging properly (Tr. 916-7). Because the accident was avoidable, Ziegler was given a warning letter and taught what to look for in the future (Tr. 919). The part of the fifth wheel coupling device that should be checked can be seen, whether the doubles are put together or not (Tr. 919-20). Wolfe does not recall ever mentioning to Billy Puckett that "if Rod Ziegler did a pre-trip inspection at his turn around as well as Calhoun that that incident of the equipment coming apart would not have happened" (Tr. 924).

Wolfe was present at the meeting in which Terry Williams told Calhoun that UPS had information that he was stealing parts (Tr. 928). Wolfe was unaware that Calhoun was taking parts to the turn-around point for repairs. The main issue was the possibility that Calhoun was hiding parts in his locker (Tr. 929). Calhoun had some old hoses in his locker, just junk parts (Tr. 933-4).

M. Testimony of Kenneth Pierson

Kenneth Pierson was in the U.S. Army from 1950 to 1953, where he worked in heavy vehicle operations and maintenance (Tr. 939). After being discharged from the military, he became a line haul driver for Dantz Freight Line in Cincinnati. Pierson went to college at the University of Maryland and worked at night as a dispatcher for Davidson Transfer. Following graduation, with a major in transportation and a minor in economics, he went to work for the Interstate Commerce Commission as a safety inspector trainee and later became a field agent. He worked at the ICC from 1958 until 1967 (Tr. 940). In 1967, the DOT was created, and Pierson was promoted to special assistant to the director at DOT (Tr. 941). From 1969 to 1970, Pierson became acting director until a new director was hired, whereupon he became the deputy director. For 10 years, Pierson was responsible for research, proposing a budget and the enforcement program (Tr. 941-2). In 1980, the incumbent Director retired, making

Pierson Director of the Bureau of Motor Carrier Safety, a position he held for six years, after which he retired (Tr. 942).

Following retirement, Pierson continued to work in the motor carrier industry as a planner, researcher, and expert witness (Tr. 943). He has been retained by UPS to render an opinion in this matter (Tr. 948). UPS's reputation is positive, and it is considered one of the leaders in safety innovation (Tr. 949-50).

The federal motor carrier safety regulations set forth vehicle and maintenance standards:

“The regulations contemplate a multi-part inspection regime for commercial motor vehicles. The parts include starting with a driver’s cursory pre-trip inspection and a driver’s detailed report at the end of his tour of duty. Secondly, the regulations require systematic and periodic servicing of the vehicle and inspection of the vehicle on either a time or on a mileage basis. Then the third part is the Department requires an annual inspection in great detail in which the vehicle must be partially disassembled in order to conduct that. Then a certification that it meets the standard, including a copy of the inspection on the vehicle and a marking on the vehicle showing when it’s due for re-inspection. The fourth element is unannounced inspection by federal and state inspectors on the public highways.”

(Tr. 951-2).

The driver’s inspections are the least technical because it is assumed that approximately five million drivers will do these checks every day as part of their duty. They are not trained mechanics and are “not expected to go beyond doing the things that are almost simplistic” (Tr. 952). The regulations do not provide specific guidelines for this type of check. The pre-trip checks take 15-30 minutes in the vast majority of trucking companies and are generally a walk-around check (Tr. 956). This means that it is not necessary for the driver to be a mechanic. He can hear air leaks, see whether lights are working, etc. (Tr. 956).

Pierson has never encountered a carrier that had its drivers separate pre-assembled doubles, and he has never met a driver who did this as a matter of routine (Tr. 964-5). In most companies, mechanics do the inspections, and drivers rely on those mechanics; so they take very little time on their pre-trip checks (Tr. 965). There are also driver teams, where the first driver does the pre-check and the second driver takes over after four hours. He does not do another check (Id.).

UPS inspection methods not only meet but exceed industry practices as well as USDOT regulations. These rules are based on a reasonable cost-effective requirement. If the rules were based solely on safety, no vehicle would ever move (Tr. 966-7).

Calhoun's pre-trip inspections are excessive. He seems to look until he finds something wrong, then demands that it be fixed with no consideration for the severity of the problem or when it can be fixed (Tr. 968-9). For example, a cracked reflector is a safety defect. However, there is no reason why a driver couldn't continue on his route and have the reflector fixed during normal scheduled maintenance (Tr. 970).

It's unnecessary to touch the air hoses because there is 40 or so feet of hose, and, if it were defective or in danger of failure, there would be observable bulges or abrasions. Also, 100 pounds of air pressure would make an audible noise if there was a leak (Tr. 985-6). It is also unnecessary to separate doubles to check whether the fifth wheel is greased. It should be apparent even if the doubles are put together (Tr. 986-7).

Pierson is unaware of any record or regulation that states that a driver can't be forced to drive if he doesn't think his equipment is safe (Tr. 992-4).

N. Testimony of Robert Tynes

Robert Tynes graduated from Florida State University in 1973. He completed one year of graduate school at Rawlings College in Winter Park, Florida before he was hired by the Interstate Commerce Commission in 1976 (Tr. 996-7). While at Rawlings College, he worked for the Florida Public Service Commission conducting roadside vehicle inspections. Tynes also completed safety compliance audits and regulated rates, charges and authority (Tr. 997). He worked there for three years from 1973 to 1976.

Tynes then went to work for the USDOT, Federal Highway Administration Office of Motor Carriers (Tr. 997). Initially, he was a safety investigator, conducting roadside vehicle inspections. In 1986, he was promoted to the position of State Program Specialist in the Michigan division overseeing federal grants to the state of Michigan to perform roadside vehicle inspections and to hold compliance reviews in the motor carriers' offices (Tr. 998). Tynes made sure that inspectors were following safe practices in conducting roadside inspections. In 1989, he was transferred and became the State Programs Manager of region four, which encompassed eight states, including North Carolina (Tr. 998-9). He also worked as the Federal Programs Manager for the same region.

Tynes then became State Director for the state of Georgia and oversaw the activities of federal agents and investigators (Tr. 999). He retired from that position in 1999. Tynes formed his own company, Bob Tynes and Associates, as a consulting firm for the motor carrier industry (Tr. 1000). UPS is not one of his clients, but he did conduct some personnel training for their employees a few years ago.

Tynes was a judge for pre-trips at the American Trucking Association National Truck Driving Competition (Tr. 1002). A vehicle which has ten defects on it is looked

over by a driver, who is judged on his ability to detect those violations. Once a driver has won the state competition, he moves on to the nationals (Tr. 1002-3). Tynes was recommended for the position of judge by the Georgia Trucking Association and became one for a couple of years (Tr. 1003).

Tynes has observed and conducted thousands of vehicle inspections during the course of his career. He has reviewed approximately 100,000 driver logs (Tr. 1004). On October 17, 2002, Tynes reviewed building and pre-tripping of three different sets of doubles at the UPS facility in Atlanta (Tr. 1006). He randomly selected two drivers for this inspection. The first driver, Chris Howard, was on his way out of the yard. He began his inspection at 1:59pm. He finished his pre-trip and exited the yard at 2:19pm. Tynes noted the driver performed a complete inspection and also noted that there were no deficiencies (Tr. 1007).

Tynes next met driver/trainer Greg Ramsey. He asked Ramsey to teach him how to do a pre-trip on a set of doubles. The tractor was not hooked to a trailer, and the trailers were not connected. Ramsey started the inspection at 2:47pm and completed the hook-up and inspection at 3:08pm. He met the UPS standards, and Tynes noted no deficiencies (Tr. 1008).

Any time a roadside inspection is conducted, the information is uploaded to a system called Safety Net, a DOT computer system (Tr. 1010). All out-of-service defects are counted as an out-of-service inspection. UPS has a 10% rate, which means that a little over 10% of the times that a UPS vehicle is inspected, they'll find an out-of-service defect (Tr. 1011).

It is not common practice for a driver to inspect air hoses by running his hands down the entire length of the hose. Even inspectors don't do that (Tr. 1023). Also, Tynes has never seen a driver check the brakes by slamming them on and attempting to leave skid marks on the gravel. This is hard on the equipment and prematurely wears out tires. Tynes is unaware of any carrier that would tolerate that (Tr. 1024). An appropriate brake check would include taking your foot off the clutch and rolling a little before slowly applying the brake. Tynes never had the opportunity to see Calhoun perform a vehicle inspection (Tr. 1038).

O. Description of Complainant's Photographs

Transcript Citation	Exhibit Number	Description by Calhoun
Tr. 38-9	JX 38	Described as a diagram of front frame rails, wheel assembly springs, steering wheel, universal joint in steering wheel shaft, pittman arm, and drag link.
Tr. 42-3	CX 6 at 46	Photo taken 9/12/01 - picture of steering rod
Tr. 44	CX 6 at 48	Photo taken 9/11/01- picture of reflective tape on trailer
Tr. 47-9	CX 6 at 1	Picture of top of fifth wheel plate and coupling device. Not

		much grease on the plate, old grease around the edges. There are dry areas present.
Tr. 52	CX 6 at 5	Picture of a fifth wheel on a dolly with rusted areas circled. Wheel not lubricated properly with grease.
Tr. 53	CX 6 at 25, top picture	Photo taken 5/30/01- picture of a group of fifth wheels on dollies in the staging area.
Tr. 53-4	CX 6 at 25, bottom picture	Photo taken 5/30/01- picture of a group of fifth wheels on dollies in the staging area. Rust on all the plates and not greased properly.
Tr. 55-6	CX 1	Pieces of hose brought to hearing. Shows flat spots and knots proving hose need replacing.
Tr. 61	CX 1A	Glad hand hooked to a hose. Showed how glad hand works to get air to brake system.
Tr. 67	CX 6 at 55	Picture of cords, should be tied to keep down vibrations which damages equipment.
Tr. 72	CX 6 at 24	Photo of lug nuts not securely tightened.
Tr. 73-4	CX 6 at 28	Photo of rusted lug nuts and a crack between the lugs.
Tr. 75	CX 6 at 29	Photo of hub with one bolt broken off. A new hub was put on but the mechanic did not drill the hole out to repair the other bolt. Oil began leaking out of the outside wheel.
Tr. 76	CX 6 at 2	Photo of a crack in the bracket between the U-joints on the trailer's left rear.
Tr. 77-8	CX 6 at 6, bottom picture	Photo of the brake wheel seal. Seal damaged and oil leaking.
Tr. 79	CX 6 at 6, top picture	Picture of loose left U-bolts. Needs to be tightened.
Tr. 80	CX 6 at 7	Photo of oil-soaked brake lining which affects the braking and could cause a wheel fire.
Tr. 85	CX 6 at 3	Photo of bent dolly handle.
Tr. 206-7	CX 6 at 1	Photo of air line to dolly from front trailer. Found knot on line by running his hand over it.
Tr. 210	CX 6 at 4	Photo of loose U-bolts.
Tr. 210	CX 6 at 5	Photo of broken dolly rear spring, had been on Lemmond's equipment all day. Leaf spring broken.
Tr. 212	CX 6 at 7, photo #13	Photo of brake lining that came off wheel. Brake lining coated in oil with results in loss of brakes on that wheel.
Tr. 215	CX 6 at 9, top picture	Photo of hole rusted in spring holder bracket on right side of trailer. Had to look under truck to find.
Tr. 217	CX 6 at 10, bottom picture	Photo of airlines with knots in them, found by running hands down lines.
Tr. 221-2	CX 6 at 17, top photo	Photo of brake chamber air lines rubbed into the fiber at the grommets.
Tr. 223-4	CX 6 at 18, top photo	Photo of split at bead line on a tire that halfway around the tire. Could cause tire to explode.

Tr. 224	CX 6 at 18, bottom photo	Photo of broken dolly spring.
Tr. 225-6	CX 6 at 19, bottom photo	Photo of trailers not latched properly together.
Tr. 230	CX 6 at 23	Photo of wheel which is wet and very dirty. Moisture present in wheel and around lugs.
Tr. 232	CX 6 at 28, top photo	Photo of possible cracked hub and oil puddles discovered visually.
Tr. 233	CX 6 at 30	Photos of broken spring. The u-bolts on the left side were very loose and there was a bad air leak. The spring slipped out of the bracket and rusted.
Tr. 234	CX 6 at 31	Photo of the brake chambers. Found crack on left side below bolts. Once broken if half, there is loss of braking on that wheel.
Tr. 235	CX 6 at 32	Photo of bad wheel seal with oil leaking.
Tr. 235-6	CX 6 at 33, top photo	Photo of air lines tied in a knot lying on the dolly.
Tr. 237	CX 6 at 33, bottom photo	Photo of rusted through spring bracket.
Tr. 243	CX 6 at 44	Photos of bolt missing on mounting bracket for spring on a dolly.
Tr. 247-8	CX 6 at 52	Photo of air lines tied in a knot. The lines were scraped up.
Tr. 251	CX 6 at 54	Photo of possible crack between the lugs. Potential safety hazard.
Tr. 254-5	CX 6 at 61, top photo	Photo of an air line that is split open. Would have to touch the line to find the defect.
Tr. 262-3	CX at 77	Photo of a dirty windshield in a tractor.
Tr. 264	CX 6 at 78	Photo of dollies which some are rusted.
Tr. 266	CX 6 at 82	Photo of a dolly frame on which the bolts are broken off. They brake from vibration.

DISCUSSION

I. Legal Standard

The Surface Transportation Assistance Act of 1982, 49 USC 31101 et seq. ("STAA" or "the act") provides, in relevant part, as follows:

- (1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because –
 - (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation,

- standard, or order, or has testified or will testify in such a proceeding; or
- (B) the employee refused to operate a motor vehicle because –
- (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
 - (ii) the employee has a reasonable apprehension of a serious injury to the employee or the public because of the vehicle's unsafe condition.

49 USC 31105(a)(1). The purpose of section 31105 is to "[protect] employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal highway safety regulations or for filing complaints alleging such noncompliance." Brock v. Roadway Express, Inc., 481 U.S. 252, 255 (1987). Subsections (A) and (B) of this provision are commonly referred to as the "complaint" clause and the "refusal to drive" clause, respectively. See e.g., Brink's Inc. v. Herman, 148 F.3d 175, 179-80 (2d Cir. 1998).

To establish a prima facie case under the STAA, a complainant must demonstrate that (1) he engaged in protected activity, (2) he was subjected to an adverse employment action, and (3) the adverse action was taken because of his protected activity. Monde v. Roadway Express, Inc., ARB No. 02-071, at 12 (Adm. Rev. Bd. 2003) (citing Yellow Freight Sys., Inc. v. Reich, 27 F.3d 1133, 1138 (6th Cir. 1994)); Self v. Jackson Rapid Delivery Serv., ARB No. 98-110, at 8 (Adm. Rev. Bd. 1998). If the complainant establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment decision. Moon v. Transp. Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). If the employer articulates a non-discriminatory reason for the adverse employment action, the complainant bears the burden of showing that the employer's reason is pretextual and that the real reason for the adverse action was retaliation. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993); see also Jones v. Consol. Pers. Corp., ARB No. 97-009, at 6 (Adm. Rev. Bd. 1997); Toland v. Burlington Motor Carriers, Inc., 93-STA-35, 12 (ALJ Oct. 31, 1994).

In a dual motive case, where the trier of fact determines that a combination of legitimate and prohibited reasons motivated the employer to take the adverse action, the employer bears the risk that the influence of legal and illegal motives cannot be separated. Mt. Healthy School District Board of Education v. Doyle, 429 U.S. 274, 287 (1987). The complainant retains the ultimate burden of proving that he was subjected to unlawful retaliation. Hicks, 509 U.S. at 507; Toland, 93-STA-35, at 12.

Calhoun argues that he engaged in protected activity when he performed pre-trip vehicle inspections that exceeded the inspections required by UPS. He also alleges that he was subjected to adverse employment action as a result of his protected activity. UPS argues that Calhoun's pre-trip inspections were not protected activities and that

any adverse employment action to which Calhoun was subjected was legitimate and non-retaliatory.

II. Complainant's Prima Facie Case

A. Are Calhoun's pre-trip inspections protected activities under the "refusal to drive" clause of 49 USC 31105(a)(1)(B)?

The STAA provides protection for an employee who refuses to operate a vehicle for one of two reasons: (1) when operating the vehicle would result in an actual violation of a federal safety regulation, or (2) when the driver has a reasonable fear of serious injury to himself or to the public because of his vehicle's unsafe condition. 49 USC 31105(a)(1)(B). These two prongs of the "refusal to drive" clause are referred to as the "actual violation" (or "when") clause and the "reasonable apprehension of serious injury" (or "because") clause, respectively. Schulman, supra.

1. Did Calhoun refuse to drive his assigned vehicles?

To establish that he engaged in protected activity, Calhoun must first show that he refused to drive his assigned vehicle. Zurenda v. J & K Plumbing & Heating Co., ARB No. 98-088, at 4 (Adm. Rev. Bd. 1998). Calhoun argues that, in refusing to follow UPS's instructions regarding his pre-trip inspections, he refused to operate a motor vehicle. His refusal to drive his assigned trucks was conditioned on his ability to inspect the trucks to his satisfaction prior to leaving the yard. UPS argues that Calhoun never engaged in protected activity because in every instance Calhoun eventually drove his vehicle.

I find that Calhoun's refusal to drive until he completed his pre-trip inspections satisfies the requirement that he refuse to drive. The record demonstrates that Calhoun did not drive his assigned vehicle unless and until he completed his pre-trip inspections. Even on those occasions when UPS managers accompanied Calhoun during his pre-trip inspections, he insisted on performing his usual inspections. Calhoun's refusal to drive was conditioned on completing his inspections of his vehicle, and I find that a conditional refusal to drive satisfies the "refusal to drive" element of Calhoun's prima facie case.

Zurenda v. J & K Plumbing & Heating Co., ARB No. 98-088 (ARB 1998) does not compel the conclusion that Calhoun's conditional refusal to drive was not a refusal. In Zurenda, the Administrative Review Board credited the ALJ's finding that the employee's refusal to drive was not based on the employee's concern for vehicle safety. Rather, the refusal to drive was based on the fact that the employee did not want to spend the night in the employer-provided hotel room. Zurenda, at 5-6. Furthermore, while the Board affirmed the ALJ's finding that Zurenda did not "refuse" to drive his vehicle when he complained about safety-related issues but then drove his vehicle, the ALJ determined that the evidence supporting the safety-related nature of the employee's refusal was incredible. Id. at 4-5. Here, there is no question but that

Calhoun's refusal to drive until he completed his pre-trip inspections was based on safety-related concerns (See e.g., Tr. 30-40, 46-60, 70, 75-7, 110).

Neither does Self v. Jackson Rapid Delivery Serv., ARB No. 98-110, at 8 (ARB 1998) compel the conclusion that Calhoun's inspections do not fit under the "refusal to drive" clause. In Self, the employee testified that she never refused to operate her vehicle and never made a complaint to anyone about allegedly unlawful directions to falsify her log book. Self, ARB No. 98-110 at 8. The evidence in this case supports the conclusion that Calhoun did refuse to operate his assigned vehicles until he completed his pre-trip inspections. Furthermore, there is no dispute that Calhoun made known to UPS his safety-related reasons for refusing to drive.

Likewise, Calhoun's conditional refusal to drive is not analogous to the employee's refusal to show up for work in Larosa v. Barcelo Plant Growers, Inc., 96-STA-10 at 2 (ARB 1996). In Larosa, the Board affirmed the ALJ's finding that a refusal to show up for work was not a refusal to drive under the STAA. Id. But the ALJ in Larosa did not credit the employee's contention that the refusal to show up for work was based on a safety-related concern. Id. at 3-4. Thus, I do not read Larosa as precluding Calhoun's safety-related conditional refusal to drive.

Because the record establishes that Calhoun refused to drive his assigned vehicles until he completed his pre-trip inspections, and because his refusal to drive was related to the safe operation of his assigned vehicles, I find that his complaint does fall under the STAA's "refusal to drive" clause.

2. Are Calhoun's refusals to drive protected under the "reasonable apprehension of serious injury" clause?

To make a prima facie case under the "refusal-to-drive" clause, Calhoun must establish either that: (1) he refused to drive because to do otherwise would have resulted in an actual violation of federal motor vehicle safety regulation, or (2) he refused to drive because he had a reasonable fear of serious injury to himself or to the public because of his vehicle's unsafe condition. 49 USC 31105(a)(1)(B)(ii). Calhoun has specifically disclaimed the argument that his claim should be granted under the "reasonable apprehension" clause (Complainant's post-hearing brief at 14-15). However, to aid the parties, I will briefly analyze Calhoun's claim under the "reasonable apprehension" clause.

To prevail under the "reasonable apprehension" clause, Calhoun must prove by a preponderance of evidence that (1) his apprehension of serious injury to himself or the public due to the unsafe condition of his vehicle was objectively reasonable, and (2) he sought, but was unable to obtain, a correction of the unsafe condition. 49 USC 31105(a)(1)(B)(ii). See also Brame v. Consol. Freightways, 90-STA-20, at 1-2 (Off. Adm. App. 1992); Brunner, 94-STA-55, at 2 (no reasonable basis for apprehension over safety of truck that had passed DMV inspection two months prior to refusal to drive and witnesses testified to the vehicle's safe operating condition); Williams, 94-STA-7, at 4

(no violation where the complainant refused to drive due to belief that a particular type of tractor was "junk" without inspecting or otherwise inquiring into the vehicle's condition).

Calhoun's claim fails under the "reasonable apprehension" clause for two reasons. First, Calhoun's has not shown that his conditional refusal to drive his assigned trucks was based on a reasonable apprehension of fear of injury based on the unsafe condition of the vehicle. So to show, Calhoun must adduce evidence to establish that a reasonable person, under the circumstances confronting Calhoun at the time he refused to drive the equipment assigned to him, would conclude that there was a bona fide danger of an accident or injury, and that, therefore, he had a "reasonable apprehension of serious injury to himself or the public due to the unsafe condition of such equipment." Robinson v. Duff Truck Line, Inc., 86-STA-3, at 9-10 (Secy's Final Dec. Mar. 6, 1987), aff'd sub. nom., Duff Truck Line, Inc. v. Brock, 848 F.2d 189 (6th Cir. 1988) (unpub.).

Calhoun has not established that, at the times he refused to drive, there were any indications that his assigned vehicles were unsafe. Calhoun's inspections were based only on his generalized desire to satisfy himself that his vehicles were safe, and he refused to drive based only on a generalized fear. This is not sufficient to invoke protection under the "reasonable apprehension" clause of section 31105(a)(1)(B)(ii). Rather, the driver must establish that, when he refused to drive, conditions existed which created a reasonable apprehension of fear of safety. Such conditions could include obvious mechanical defects in the equipment or weather conditions which made driving too hazardous. See e.g., Yellow Freight Sys., Inc. v. Reich, 38 F.3d 76, 79-82 (2d Cir. 1994) (refusal to drive based on unsafe conditions created by fuel system problem); Stauffer v. Wal-Mart Stores, Inc., ARB No. 99-107, at 9 (Adm. Rev. Bd. 1999) (driver fatigue); Garcia v. AAA Cooper Transportation, ARB No. 98-162, at 4 (Final Dec. & Order 1998) (physical condition of driver); Stiles v. J.B. Hunt Transport, Inc., 92-STA-34 at 2-3 (Secy's Final Dec. September 24, 1993) (refusal to drive because of bald tires, noise in the clutch, and leaking brake lines was reasonable); Robinson, supra (refusal to drive based on hazardous weather conditions). Calhoun has not established that any such mechanical problems, physical conditions, or weather conditions existed which, at the time he refused to drive, would have led a reasonable person to fear for his safety or that of others.

Calhoun's complaint also fails analysis under the "reasonable apprehension" clause because, even assuming his perception of the unsafe condition of his vehicles was objectively reasonable, he has not established that he sought and was unable to obtain from UPS correction of the unsafe condition, giving rise to his refusal to drive. 49 USC 31105(a)(1)(B)(ii) (the "communication requirement"). Yellow Freight Sys., Inc., 38 F.3d at 83-84. Calhoun has not presented evidence of any specific mechanical defect or safety concern which prompted his refusals to drive. Without specific concerns which he could bring to the attention of his supervisors, Calhoun cannot demonstrate that UPS

ignored any specific safety concerns.² Thus, Calhoun's pre-trip inspections cannot meet the criteria for refusals to drive under the "reasonable apprehension" clause of 49 USC 31105(a)(1)(B)(ii).

Thus, I find that Calhoun's claim is only viable under the refusal to drive clause if he can establish that his refusal to drive was based on actual violations of motor vehicle safety regulations.

3. Were Calhoun's refusals to drive based on "actual violations" under 49 USC 31105(a)(1)(B)(i)?

Calhoun argues that his vehicle inspections are protected under the "actual violation" prong of the "refusal to drive" clause because failure to assure himself that that his assigned vehicles were safe would have resulted in actual violations of safety regulations. Calhoun does not allege that his vehicle's condition was unsafe, and thus, a violation of any specific safety regulation. Rather, he asserts that failure to assure himself that his assigned commercial vehicles were in good working order and safe operating condition before he operated them on the highways would have resulted in actual violations of the generalized safety regulations set out at 49 CFR 392.7 and 396.13.

Section 392.7 reads as follows:

No commercial vehicle shall be driven unless the driver is satisfied that the following parts and accessories are in good working order, nor shall any driver fail to use or make use of such parts and accessories when and as needed:

Service brakes, including trailer brake connections.

Parking (hand) brake.

Steering mechanism.

Lighting devices and reflectors.

Tires.

Horn.

Windshield wiper or wipers.

Rear-vision mirror or mirrors.

Coupling devices.

49 CFR 392.7. Section 396.13 reads as follows:

Before driving a motor vehicle, the driver shall:

- (a) Be satisfied that the motor vehicle is in safe operating condition;
- (b) Review the last driver vehicle inspection report; and

² Calhoun's generalized complaints of safety violations are, however, sufficient to invoke protection under the "complaint clause" of 49 USC 31105(a)(1). See discussion section II(B), infra.

(c) Sign the report, only if defects or deficiencies were noted by the driver who prepared the report, to acknowledge that the driver has reviewed it and that there is a certification that the required repairs have been performed. The signature requirement does not apply to listed defects on a towed unit which is no longer part of the vehicle combination.

49 CFR 396.13.

Calhoun argues that, even if the employer is satisfied that the listed parts and accessories are in good working order, 49 CFR 392.7 and 396.13 require that the driver must also be satisfied. He asserts that an employer violates these motor vehicle safety regulations if the employer prevents a driver from being reasonably satisfied with the safety of his vehicle. Thus, a driver engages in protected activity when he refuses to drive until he is reasonably satisfied that his vehicle is safe.

Calhoun acknowledges that the driver's level of satisfaction with the safety of the vehicle is not unfettered. Citing Monde v. Roadway Express and Ex Parte No. MC-4, Calhoun agrees that a reasonableness standard applies to the driver's pre-trip inspection. See Monde v. Roadway Express, ARB No. 02-071 (ARB 2003); Ex Parte No. MC-4, 1 M.C.C. 1 (Dec. 23, 1936). According to Calhoun, if the driver of a commercial vehicle is not reasonably satisfied that the parts and accessories listed in 49 CFR 392.7 and referenced in 49 CFR 396.13 are in good working order, then driving the vehicle would result in an actual violation of those regulations regardless of whether the listed parts are actually demonstrated to be defective. Calhoun argues that his personal pre-trip vehicle inspections were necessary to ensure that he was reasonably satisfied that his vehicle was safe. He contends that UPS's instructions to him regarding pre-trip inspections prevented him from being reasonably satisfied, in contravention of 49 CFR 392.7 and 396.13. Thus, Calhoun's refusal to drive was based on an actual violation of these federal motor vehicle regulations.

UPS argues that, no matter how reasonable a driver's pre-trip inspection may be, there is no "actual violation" of a motor vehicle regulation unless the driver proves that his truck "was actually unsafe when [he] seeks protection." Yellow Freight Sys., Inc. v. Reich, 83 F.3d 76, 82 (2d Cir. 1994) (citing Brame v. Consol. Freightways, 90-STA-20 (Off. Adm. App. 1992) and Robinson v. Duff Truck Line, Inc., 86-STA-3 (Off. Adm. App. 1987)). In other words, according to UPS, Calhoun must show that the operation of his vehicle would have been "a genuine violation of a federal safety regulation at the time he refused to drive – a mere good faith belief in a violation does not suffice." Yellow Freight Sys., Inc. v. Martin, 983 F.2d 1195, 1199 (2d Cir. 1993). See also Stauffer v. Wal-Mart Stores, Inc., ARB No. 99-107, at 7 (ARB 1999); Beveridge v. Waste Stream Envtl. Serv., Inc., ARB No.97-137, at 2 (ARB 1997) (complainant's good faith but mistaken belief that driving vehicle would violate a safety regulation was not protected under the STAA); Boyles v. Hwy. Express, Inc., 94-STA-21, at 2 (Off. Adm. App. 1995) (complainant's good faith but mistaken belief that driving would have caused him to exceed available hours of service was not protected under the STAA).

The Board has previously addressed the issue of whether a driver's inspection of his vehicle pursuant to 49 CFR 392.7 and 396.13 is protected activity under section 31105(a)(1)(B)(i). Monde v. Roadway Express, Inc., ARB No. 02-071, at 13 (ARB 2003). In Monde, the Board rejected a proposed interpretation of section 31105(a)(1)(B)(i) and 49 CFR 392.7 and 49 CFR 396.13 similar to that urged by Calhoun in this case. The complainant in Monde argued that he engaged in protected activity when he performed interim tire inspections pursuant to 49 CFR 392.7 and 396.13 which exceeded DOT and employer-imposed requirements. He explained that he was required to perform these tire inspections in order to satisfy himself that the equipment remained safe during the course of his trips. Monde at 13. The Board noted that Monde's approach to ensuring safe tire conditions was prospective rather than actual in the sense that he inspected tires routinely at designated intervals and without specific cause. Id. In rejecting Monde's proposed interpretation of the act, the Board explained that the issues for purposes of section 31105(a)(1)(B)(i) were "whether Monde complied with the general regulations by performing regular, interim tire inspections . . . and whether [the employer] violated these regulations by prohibiting Monde's compliance." Id. The Board found that, because the general regulations do not mandate regular, interim tire inspections, Monde's tire inspections were not protected activity.³

Monde does not compel me to deny Calhoun's claim. Monde suggests that a driver's vehicle inspections are protected only when he acts reasonably. Id. at 13. A standard of reasonableness is a substantially narrower rule than the position advocated by the complainant in Monde that a driver has an essentially limitless right to be "personally satisfied" with the safety of his vehicle. The ALJ in Monde determined that the driver's interim tire inspections were not reasonable, and the Board concluded that the ALJ's determination that the driver was unreasonable was supported by substantial evidence. Id. at 13-14. Thus, because I find that at least some of Calhoun's pre-trip activities were reasonable, I do not read Monde as requiring me to deny Calhoun's claim.

I find that, to establish a violation of sections 49 CFR 392.7 and 396.13, Calhoun must prove that his inspections were reasonable, that he complied with the general regulations by performing his pre-trip inspections, and that UPS violated the regulations by prohibiting him from conducting the pre-trip inspection of his choice. The focus of the inquiry is on the reasonableness of the driver's behavior, not on the reasonableness of the employer's response. Id. at 13-14. Thus, the key question in this case is whether, in conducting his pre-trip inspections, Calhoun acted reasonably.

4. Were Calhoun's pre-trip inspections reasonable?

³ Id. at 14. While the tire inspections in Monde were found not to be mandated by the general regulations, I cannot conclude that the general safety regulations have no force. The regulations must have some meaning, and there must be some mechanism for enforcing them. Thus, I conclude that a driver engages in protected activity if he refuses to violate the general safety provisions.

In determining whether Calhoun's pre-trip inspections are protected by the act, I must first determine whether Calhoun's pre-trip inspections were reasonable. I will evaluate the various components of Calhoun's pre-trip inspections for which he alleges that he was disciplined. I will then determine whether UPS's instructions to Calhoun regarding any of the components of his pre-trip inspection prevented Calhoun from being reasonably satisfied that his vehicle was in safe working order. If I find that Calhoun's inspections were reasonable and based on legitimate safety concerns, then I will find that those inspections are protected. If Calhoun's inspections are unreasonable, then I must find that they are not protected activities.

a. The components of Calhoun's pre-trip inspection

(i). Cleaning the reflective tape and trailer taillights

The UPS pre-trip inspection does not require that the driver wipe down the reflective tape and lights on the trailers. However, since 1999, Calhoun has wiped dirt and dust off the reflective tape and tail lights of his assigned trailers. He wipes the reflective tape and lights so that his trailer is more visible to other drivers. This does not increase Calhoun's pre-trip inspection time because he wipes down the reflective tape as he walks around the trailer (Tr. 34). The North Carolina CDL manual indicates that drivers "should clean all lights, reflectors, and glass as [they] go along" (JX 38 at 2-10).⁴ UPS drivers Thomas Hope and Joseph Lemmond also wipe off the reflective tape and taillights on their assigned trailers (Tr. 511, 561). David Sherman understood that it is within the driver's discretion whether to wipe down the reflective tape (Tr. 734). There is no evidence that Calhoun was instructed not to wipe down the lights and reflective tape on his trailers.

Clearly visible tail lights and reflectors are necessary to the safe operation of a commercial motor vehicle. See 49 CFR 392.7. A driver should be reasonably satisfied that the lights and reflectors are visible to other drivers. There is no evidence that cleaning the lights and reflectors is unnecessary. The only way for the lights and reflectors to be cleaned is for the driver to do the cleaning personally. Thus, I find that

⁴ Calhoun has a commercial driver's license and principally drives his rig in North Carolina. Calhoun v. United Parcel Service, ARB No. 00-026, ALJ No. 1999 STA 7 (ARB Nov. 27, 2002). The North Carolina commercial drivers license (CDL) manual is published by the North Carolina Department of Transportation Division of Motor Vehicles (JX 38). The manual "describes the minimum requirements for obtaining a commercial driver's license in North Carolina and provides information to assist [drivers] in passing the required knowledge and skills tests" (Id. at 1-1). The introduction to the manual explains that "The North Carolina law was passed in 1989 to comply with the Federal Commercial Motor Vehicle Safety Act of 1986 which set minimum standards for a CDL in order to reduce accidents involving commercial motor vehicles" (Id.). Thus, I find that the North Carolina CDL manual has been demonstrated to be authoritative as an expert treatise in this case. The CDL manual was drafted to provide "knowledge and safe driving information" to all North Carolina commercial truck drivers (JX 38 at 2-1), and those instructions to commercial truck drivers bear on the reasonableness of Calhoun's activities.

Calhoun's practice of wiping down reflective tape and tail lights during his pre-trip inspection is reasonable. Therefore, Calhoun's refusal to drive conditioned on cleaning the lights and reflectors on his assigned vehicles is protected activity.

(ii). Manually checking brake hoses

The UPS pre-trip inspection includes a visual inspection of the air hoses that supply the brake system on the trailers (Tr. 57). In addition to the UPS-mandated visual inspection, Calhoun inspected the air lines by running his hands along hoses. Through his manual inspection of the air lines, he has discovered cuts, flat spots, bulges, and knots (Tr. 55). These defects were not always noticeable through a visual inspection of the air lines (Tr. 56-7). An air line may appear to be in good condition, but, upon manual inspection, the back of the line may be cut or worn (Tr. 58). Wear on the back sides of the air lines may not be noticed in a visual inspection (Tr. 64). If an air line breaks and the break system loses air, it could cause a breakdown or an accident (Tr. 68-9).

Other UPS drivers manually inspect the air hoses on their trailers (Tr. 511, 556-7, 577-8). Bill Puckett testified that he has discovered many cuts and leaks only by handling the air lines (Tr. 450, 462, 474). Larry Fargis testified that UPS mechanics check the hoses by handling them (Tr. 766-7). Jeffery Shultz testified that the way to inspect hoses for flat spots, bulges, and cuts is to manually inspect them (Tr. 494).

Working brakes are essential to the safe operation of a commercial motor vehicle. 49 CFR 392.7. A driver must take reasonable steps to ensure that his brakes (including trailer brake connections) are in working order. Although the UPS pre-trip inspection does not require a manual inspection of brake lines, testimony from other UPS drivers establishes that it is common practice among at least some drivers (in addition to Calhoun) to manually inspect brake lines (Tr. 450, 462, 474, 511, 556-7, 577-8).

Kenneth Pierson testified that it is unnecessary to touch the air hoses because, if the hoses were defective or in danger of failure, there would be observable bulges or abrasions or audible indications of leaks (Tr. 985-6). Robert Tynes testified that it is not common practice for a driver to inspect air hoses by running his hands down the entire length of the hose (Tr. 1023). I do not credit the testimony of Pierson and Tynes over the testimony of the UPS feeder drivers who find a manual inspection of brake lines necessary (Tr. 450, 462, 474, 511, 556-7, 577-8). Instead, I credit the drivers, who are better positioned to know what common practice among drivers is as well as what is necessary. Furthermore, I am particularly persuaded by the testimony that defects in the brake lines have been found by drivers, including Calhoun, which defects were only detectable through a hands-on inspection of the lines (Tr. 55, 450, 462, 474, 511, 556-7, 577-8). Thus, I find that Calhoun's manual inspection of brake lines during his pre-trip inspections was reasonable and that his refusal to drive conditioned on manually inspecting the brake lines on his assigned vehicles is protected activity.

(iii). Checking underneath the trailers

The UPS pre-trip inspection does not expressly call for the driver to check underneath his equipment. However, Calhoun looks underneath his equipment as part of his pre-trip inspection (Tr. 442). While looking underneath his equipment, Calhoun checks the dolly brakes. Shultz explained that the proper method for inspecting the dolly breaks is to crawl under the trailers and look at the brakes (Tr. 495). Calhoun acknowledged that he has never been told not to look underneath his equipment as part of his inspection. Furthermore, he testified that he has never been disciplined for looking underneath his equipment (Tr. 356).

(iv). Manually checking some lug nuts

The UPS pre-trip inspection requires a visual inspection of the lug nuts. The presence of rust streaks near the lugs can indicate that the lug nuts are loose (Tr. 71). Loose or missing lug nuts could cause a wheel to come off, causing a breakdown or an accident. While conducting his visual inspection of the lug nuts, Calhoun also checks some lugs for looseness by touching them and twisting them (Tr. 71). Through his manual inspection, he has discovered loose lug nuts even when no rust streaks were visible (Tr. 71).

Other UPS drivers, including Joseph Lemmond and Randall Williams, inspect lug nuts by touching them (Tr. 560, 577). Former driver Larry Brower was trained by UPS to touch lug nuts as part of his pre-trip inspection (JX 84 at 495). The North Carolina CDL manual states that "wheel nuts should be checked for tightness" (JX 38 at 2-2).

Tires are specifically mentioned in 49 CFR 392.7. That secure tire connections are essential to the safety of a commercial motor vehicle cannot be questioned. While the UPS pre-trip inspection method for lug nuts may be reasonable, Calhoun's personal experience has provided a reasonable basis for a driver in his position to manually check some lug nuts. He testified without contradiction that he has found loose lug nuts even in the absence of rust streaks (Tr. 71). Other drivers and former drivers testified similarly (Tr. 560, 577; JX-84 at 495). Furthermore, there is no evidence that manually inspecting the lug nuts measurably increased the length of time Calhoun spent in the yard. His personal experience and uncontradicted testimony that other drivers also manually inspect lug nuts (Tr. 71) satisfy me that checking lug nuts is a reasonable pre-trip activity. Thus, I find that his refusal to drive conditioned on manually inspecting the lug nuts on his assigned vehicles is protected activity.

(v). Wiping down the interior of the driver's compartment

Calhoun uses a rag and glass cleaner to wipe down the steering wheel, shifter, and dashboard of his assigned tractor-trailer (Tr. 96-97). He performs this part of his pre-trip inspection while the brake system is building up air pressure. Calhoun opined that this does not delay his departure from the UPS facility (Tr. 97-8).

I do not doubt that Calhoun believed that operation of his assigned vehicles would be safer if his steering wheel and shifter were clean. However, there is no

testimony or evidence that a clean steering wheel is necessary to the safety of the vehicle or that a steering wheel that had not been cleaned is somehow defective. Nevertheless, I find it unreasonable that Allen instructed Calhoun not to wipe down his steering wheel. While a clean steering wheel may not be absolutely essential to the safety of the vehicle, it is not unreasonable for a driver to clean the steering wheel. Drivers Puckett and Lemmond also cleaned their steering wheels and shifters (Tr. 460, 566), and there is no testimony from UPS's expert witnesses that a dirty steering wheel is nonetheless safe. I doubt that the time it would take for Calhoun to clean his steering wheel and shifter in any measurable way contributed to his excessive start-work times.

However, there is no evidence from which I can conclude that cleaning the interior of his truck cab is reasonably connected to safety. Thus, I find that Calhoun's in-cab cleaning routine is not protected activity.

(vi). Checking steering components, belts, and hoses inside the engine compartment

Per the UPS pre-trip inspection routine, drivers are supposed to visually inspect the components in the engine compartment for wear. Calhoun manually checks the belts, engine fan, and hoses for wear and checks for the tightness of belts by grabbing and pulling the belts (Tr. 125; JX 84). He opined that the tightness of belts and hoses cannot be determined by a visual inspection.

Other UPS drivers check the belts and hoses by touching them (Tr. 451, 453, 557, 577). The North Carolina CDL manual instructs that a driver should check the tightness of each belt and hose in the engine compartment, including the air compressor drive belt (JX 38 at 2-8; 5-6).

The UPS pre-trip inspection requires only a visual inspection of the steering system components in the engine compartment. The North Carolina CDL instructs that one must grab the steering mechanism to check for looseness (JX 38 at section 2-10). Calhoun checked the steering system of his assigned truck by reaching into the engine compartment and twisting the steering shaft and shaking the drag link (Tr. 37, 38). In this manner he was able to check for excessive free play in the universal joint. If there was excessive free play in the universal joint, then Calhoun would have it replaced. If the universal joint broke, there could be a loss of steering (Tr. 37). Free play in the universal joint cannot be determined by a visual inspection (Tr. 37).

Jeffrey Shultz explained that mechanics use channel locks to check the steering linkage for looseness. He noted that, if the universal joint has free play when twisted by hand, then it is "already past time to replace [the universal joint]" (Tr. 492). UPS mechanic Larry Fargis testified that the mechanics use their hands to shake the drag link to check for tightness (Tr. 465).

The North Carolina CDL manual supports Calhoun's manual inspection of the steering system components (JX 38 at sections 2-1, 2-2, 2-3, 2-10). Likewise, the experiences of other UPS drivers support Calhoun's manual inspection of the steering

system. Calhoun learned that other drivers have had problems with the drag links, tie rod ends, and steering rods on their assigned trucks. Calhoun knew one driver who experienced a complete loss of steering as he entered Interstate 85 because of a broken universal joint (Tr. 33). Another driver lost a tie rod while entering a highway ramp. Two drivers have had drag links which needed repairs before they left the UPS terminal (Tr. 33-4). Other UPS drivers inspect the steering systems of their assigned trucks in a manner similar to Calhoun's inspection (Tr. 450-51, 510, 558-9, 577).

The steering components are specifically listed in 49 CFR 392.7. A driver must be reasonably satisfied that the steering components are in good working order. Although the UPS pre-trip inspection does not involve a manual inspection of the steering components, it is nonetheless reasonable for a driver in Calhoun's position, with knowledge of the problems experienced by other drivers, to examine the tie rods, universal joint, and steering assemblage of his assigned trucks. Thus, Calhoun's pre-trip manual inspection of the engine-compartment steering components is protected activity.

Furthermore, I find that it is reasonable for a driver to manually inspect hoses and belts prior to driving his vehicle. A defective belt or hose could impede the safe operation of a commercial motor vehicle (Tr. 125). Calhoun testified without contradiction that the only way to check the tightness of belts was to grab them (Tr. 125). Other drivers testified that they too manually inspect belts and hoses (Tr. 451, 453, 557, 577). Finally, the North Carolina CDL manual, while not binding here, supports Calhoun's decision to manually inspect belts, hoses, and the steering components (JX 38 at 2-8, 2-10, 5-6).

(vii). Performing unapproved brake test

Calhoun testified that he performs two different tests of his brakes (Tr. 101-02). He performs the brake test required by UPS, which involves driving across the yard at ten miles per hour and then applying the brakes (Tr. 102). In addition, he also performs a test of the brakes by backing his truck up against the front trailer and then "tugging against it" (Tr. 101). He performs this second test to determine whether any of the wheels were "free-rolling" (Tr. 102). Employer's expert's testimony notwithstanding (Tr. 1024), Calhoun's brake test is the same test described in the North Carolina CDL manual, and I find it to be a reasonable method of ensuring that the brakes are functioning properly (JX 38 at 5-8).

(viii). Disassembling pre-assembled double trailers

Another component of Calhoun's pre-trip inspections that exceeded UPS inspection methods was the uncoupling of double-trailer sets that were pre-assembled by UPS mechanics (Tr. 34-5). Formerly, Calhoun sometimes assembled his trailer sets, but UPS began having mechanics pre-assemble trailers for him in an effort to speed up his inspection times and get him on the road faster (Tr. 378). Calhoun disassembled the pre-built doubles because he wanted to check the fifth wheel, which is the coupling device that attaches the second trailer to the first trailer (Tr. 47-8). In his inspection, Calhoun checks to see that the top of the fifth wheel is lubricated properly,

and he inspects the jaws to look for foreign objects (Tr. 48). It is important that the fifth wheel is properly lubricated because it affects the ease with which the unit can be steered (Tr. 48). The North Carolina CDL manual suggests that drivers check the fifth wheel to ensure that it is properly lubricated (JX 38 at 6-8).

Calhoun does not believe that he can properly check the sufficiency of the connection without uncoupling the trailers (Tr. 50-1). However, he does not know of any other UPS driver who separates pre-assembled double trailers and inspects them as he does (Tr. 403-06). Other drivers have pulled apart the double trailers when they suspected that there were problems (Tr. 459, 465, 512).

Calhoun was instructed several times not to pull the doubles apart unless he perceived a specific problem (Tr. 373, 391, 400-1).⁵ Nevertheless, he openly stated to UPS management that he would not comply with instructions not to separate the doubles (Tr. 374). Calhoun separated doubles every time they were pre-built for him between June and October 2001 (Tr. 391-2). He refused to comply with UPS instructions regarding doubles and stated that he would "go back to [his] method as soon as this bullshit is over" (Tr. 380-4). Calhoun testified that he separated his pre-built doubles even though he did not observe anything specifically wrong with the trailers (Tr. 391). He could not estimate how many times the fifth wheel was not properly greased when he built the double sets (Tr. 54).

Calhoun was aware of the company's position on breaking apart pre-built doubles, but he continued to ignore UPS, explaining, "because I wanted to satisfy myself about the equipment" (Tr. 400-1). Calhoun disassembled his pre-built doubles on April 10, 2002 and April 11, 2002 (Tr. 398). He also pulled the trailers apart on May 7, 2002 even though he had no specific reason for doing so (Tr. 400-1). Calhoun

⁵ The instructions from UPS management to Calhoun regarding disassembling the pre-built doubles were explained in the following exchange at the hearing:

[Employer's counsel] Question: "if you observe a visual problem, it's okay to separate the doubles, it's just you're not supposed to do it as part of your normal pre-trip, isn't that right?"

[Calhoun] Answer: If I...

Question: The instructions you have received from Allen and Wolfe and Sherman in this regard have been that you are not to separate your pre-assembled doubles as part of your normal pre-trip, but that if you observe a specific problem it's okay for you to do that, isn't that right?

Answer: I believe so.

Question: Well, a bent handle would be a specifically observable problem on a pre-assembled unit, wouldn't it?

Answer: I think so.

Tr. 425-6.

testified that he was fired on October 30, 2001 for separating doubles (Tr. 173-5). He also testified that he was fired on May 7, 2002 for the same thing (Tr. 190-94, 390).

After May 7, 2002, Calhoun was told that, if he separated doubles again, he would be terminated permanently (Tr. 203-5). UPS explained that, if he continued to pull apart the trailers, his actions would be considered gross insubordination and would result in his being fired (Tr. 401-02). After receiving this warning, Calhoun stopped pulling apart the trailers (Tr. 83-4).

Calhoun produced photographs of fifth wheel dollies (CX 6) that showed bare spots and rust. However, he acknowledged that the photographs were taken of trailers sitting in the Greensboro yard. None of the photographs was of trailers assigned to Calhoun (Tr. 410-12).

Properly assembled coupling devices are critical to the safe operation of double trailer sets. Section 392.7 requires that a driver be reasonably satisfied that the coupling device on his assigned vehicle is in good working order. 49 CFR 392.7. However, I find that Calhoun's decision to pull apart pre-assembled doubles without any specific reason for so doing has not been shown to be reasonable. The record does not support the conclusion that Calhoun's practice of disassembling pre-built doubles was necessary to ensure the safety of his trailers. No other driver routinely pulls apart pre-assembled doubles as Calhoun does. He has not presented testimony that his pre-assembled doubles were not properly inspected prior to assembly. Nor has Calhoun established that he was prevented from disassembling doubles if he saw a specific defect or had a specific safety concern. In fact, all evidence is to the contrary. Thus, I find that UPS's instructions to Calhoun not to disassemble his pre-built doubles absent a specific indication of a safety issue did not prevent Calhoun from being reasonably satisfied with the safety of his assigned vehicles. Therefore, disassembly of the pre-built doubles is not protected activity.

I am faced with the following difficult problem: what to do when both sides are reasonable, as I have found that they are. In other words, do a driver's reasonable safety precautions trump a company's reasonable safety procedures and legitimate profit motive?

Safety is not absolute. However, I find that, in this case under these facts, Calhoun's reasonableness trumps UPS's. It is the driver, not the company that risks injury or death on the highway in case of equipment failure. I find that the purposes of the STAA are best served by allowing Calhoun to take most of the precautions he took without fear of disciplinary actions. See Brock v. Roadway Express, Inc., 481 U.S. 252, 262 (1987) (citing 128 Cong. Rec. 32509, 32510, 32698 (1982) (remarks of Sen. Danforth and Sen. Percy)); see generally, Boone v. Trans Fleet Enter., Inc., 1990-STA-7 (Sec'y July 17, 1991) aff'd sub nom. Trans Fleet Enter., Inc. v. Boone, 987 F.2d 1000 (4th Cir. 1992); Somerson v. Yellow Freight Systems, Inc., 1998-STA-9 (ARB Feb. 18, 1999). To frame the question otherwise would improperly focus on the behavior of the employer rather than of the driver and would destroy any whistleblower protections for

any driver, no matter how reasonable, who exceeds the minimum reasonable safety standards imposed by the employer.

5. Was Complainant subjected to adverse employment action?

I will now discuss each instance of alleged adverse employment action. First, I will determine whether Calhoun engaged in protected activity on the date in question. If Calhoun's pre-trip inspections on the dates in question were reasonable, then I will find that he engaged in protected activity by refusing to drive until completing his inspections and by making internal complaints that he was being prevented from ensuring that his vehicle was safe. Then, I will determine whether Calhoun was subjected to adverse employment action, and, if so, whether there was a causal link between Calhoun's protected activity and the adverse employment action.

a. Has Calhoun established a prima facie case of discrimination on June 26, 2001?

(i). Did Calhoun engage in protected activity?

Calhoun engaged in protected activity on June 26, 2001. On this day, Calhoun had an on-the-job supervision ride with Don Allen. Allen accompanied him through his entire work day, including his vehicle inspection (Tr. 89). That morning, the doubles had not been put together; so Calhoun attached the doubles himself. After inspecting the front trailer, he checked the dolly and found the latch to be malfunctioning (Tr. 90). Allen told him to hook the dolly up anyway and attach the second trailer, but, when he tried to uncouple the trailer and reset it, he was unable to (Tr. 92-3). They decided to take the trailer to the shop to be checked by a mechanic (Tr. 94). The brake drum on the initial replacement dolly was defective. Finding another replacement dolly further delayed Calhoun's departure from the yard (Tr. 107).

During the supervision ride, Allen observed Calhoun wipe down the dash, steering wheel, gear shifter and buttons. Calhoun touched lug nuts, belts, hoses, and engine-compartment steering components. He also performed an unapproved brake test. After observing Calhoun wiping down the steering wheel and shifter, Allen asked Calhoun to stop his inspection because he wasn't adhering to the UPS methods (Tr. 123-4).

After completing the supervision ride, Allen told Calhoun not to touch air lines the following day (Tr. 112). Allen also told Calhoun that "touching hands on everything is not necessary nor recommended" (Tr. 117).

Manually inspecting lug nuts, belts, hoses, and steering components are protected activities. Manual inspection of brake lines is also protected activity. Calhoun has established that he performed all of these activities on June 26, 2001. Calhoun also cleaned the interior of his truck, but cleaning the interior of the truck cab is not protected activity.

(ii). Did UPS take adverse action against Calhoun?

Calhoun received a warning letter for touching the steering and lugs, after which he resumed his vehicle inspection. He was given a one-day suspension for touching the steering rod, drag link and a couple of lug nuts (Tr. 118-20). A warning letter coupled with a one-day suspension from work without pay constitutes adverse employment action. 49 USC 31105(a)(1); Calhoun v. United Parcel Service, ARB No. 00-026 (ARB Nov. 27, 2002) (citing Von Gunten v. Maryland, 243 F.2d 858 (4th Cir. 2001)).⁶ Thus, Calhoun has established that he was subjected to adverse employment action on June 26, 2001.

(iii). Did the adverse action result from Calhoun's protected activity?

Calhoun has established a causal connection between his protected activities and the adverse employment action. During the June 26, 2001 meeting in which Calhoun was suspended, Allen advised him that he would have to follow UPS methods during his inspections (Tr. 121). Allen explained that Calhoun: (1) spent too much time doing his visual inspection; (2) looked at things more than once and for too long (Tr. 789); (3) touched things in the engine compartment unnecessarily, for example, grabbing the hoses and mashing or squeezing them; (4) grabbed the fan and the steering linkages on the tractor wheel and also turned the lug nuts (Tr. 788-9); (5) crawled under the trailer to check the spring gaps, which UPS does not require (Tr. 790); and (6) spent too much time during his in-cab routine doing personal things instead of productive activities while air pressure built (Tr. 788). Allen's report also stated that Calhoun completed an unapproved brake check because he backed up to the front trailer and pulled against it to check for free-rolling wheels (Tr. 100-1). Even though UPS cited this brake test as a reason for Calhoun's suspension, he was not suspended for the brake test alone. The record clearly indicates that Calhoun was suspended at least in part for his protected activities (Tr. 788-90). Thus, Calhoun has established a prima facie case of discrimination on June 26, 2001.

⁶In Calhoun v. United Parcel Service, ARB No. 00-026, ALJ No. 1999 STA 7 (ARB Nov. 27, 2002), the Board explained that "adverse actions need not rise to the level of ultimate employment decisions." Calhoun v. United Parcel Service, ARB No. 00-026, ALJ No. 1999 STA 7 (ARB Nov. 27, 2002) (citing Von Gunten v. Maryland, 243 F.2d 858 (4th Cir. 2001)(Title VII case)). In Von Gunten v. Maryland, a Title VII case, the Fourth Circuit found that "adverse action includes not only ultimate employment decisions such as firing or demotion, but also actions that result in 'adverse effect[s] on the terms, conditions, or benefits of employment.'" Von Gunten v. Maryland, 243 F.2d 858, 866 (4th Cir. 2001). The Fourth Circuit's interpretation of adverse action comports with the language of the act, which prohibits an employer from "discharg[ing] . . . disciplin[ing] or discriminat[ing] against an employee regarding pay, terms, or privileges of employment. . ." 49 USC 31105(a)(1).

b. Has Calhoun established a prima facie case of discrimination on June 27, 2001?

(i). Did Calhoun engage in protected activity?

On June 27, 2001, Allen again accompanied Calhoun during his vehicle inspection (Tr. 128). Calhoun discovered an air leak at the rear valve of the trailer using UPS inspection methods. However, he was written up for improperly scanning equipment. The UPS method states that Calhoun is supposed to walk around the truck, and, if he does not hear an air leak or see anything during a quick inspection, he is not to touch anything (Tr. 130). Calhoun asked Allen to be left alone during his inspection because he wanted to check the air lines and because the truck is his responsibility from the moment he picks up the keys in the morning until he turns them in at night (Tr. 131).

It took Calhoun 16 minutes to complete his tractor check. On the 27th, the pre-trip check took 22 minutes (Tr. 795-6). He did not alter his routine in any way and actually increased his time by exaggerating his inspections (Id.).

(ii). Did UPS take adverse action against Calhoun?

There is no evidence that Calhoun was subjected to any adverse employment action on June 27, 2001. Therefore, he has failed to make a prima facie showing of employment discrimination on that date.

c. Has Calhoun established a prima facie case of discrimination on June 28, 2001?

(i). Did Calhoun engage in protected activity?

On June 28, 2001, Calhoun began his pre-trip inspection the same way as before. He made no changes or alterations to his routine (Tr. 797-8). Allen stopped him half way through and took him to the feeder office to review where things stood. Randall Williams was also present (Tr. 798). Allen explained to Calhoun that, over the past two days, he had seen no effort on Calhoun's part to comply with suggestions made by his supervisor and, due to his defiance, Allen had no alternative but to take disciplinary action (Tr. 799).

After the meeting, Williams, Allen and Calhoun went back to the yard for Calhoun to continue his pre-trip inspection. He continued his inspection in the same manner as before, touching lug nuts, handling hoses and wiping down the interior of the cab after being told not to (Tr. 800). Allen stopped him again and asked him to step down from the cab. Calhoun was being rebellious at this point, and Allen and Williams accompanied him back upstairs to the office (Tr. 800-01).

(ii). Did UPS take adverse action against Calhoun?

On June 28, 2001, Calhoun was sent home with a one-day suspension without pay (Tr. 801). Suspension without pay constitutes adverse employment action. See Calhoun v. United Parcel Service, ARB No. 00-026 (ARB Nov. 27, 2002) (citing Von Gunten v. Maryland, 243 F.2d 858 (4th Cir. 2001)).

(iii). Did the adverse action result from Calhoun's protected activity?

Williams' testimony establishes a causal connection between Calhoun's protected activities on June 28, 2001, and the ensuing one-day suspension issued by Allen. Williams participated in a meeting with Calhoun and Allen. Williams observed Calhoun begin his pre-trip report and heard Allen tell Calhoun not to touch items such as the lug nuts (Tr. 578-9). When Calhoun continued to touch items that Allen told him not to touch, Allen said that he would issue a warning letter for failure to follow instructions (Tr. 579). The pre-trip inspection was not completed because Calhoun began to clean the windshield. During the meeting in which Calhoun was issued a warning letter, he was also told that he was taking too long in the yard (Tr. 586). Calhoun was not complying with Allen's instructions because he was wiping down the cab instead of doing the required in-cab checks (Tr. 588).

Allen's testimony confirms that Calhoun was suspended at least in part because of his protected activities. Allen testified that Calhoun made no changes from his previous vehicle inspections. Allen stopped Calhoun halfway through and took him to the feeder office to review where things stood. Allen explained to Calhoun that, over the past two days, he had seen no effort on Calhoun's part to comply with suggestions made by his supervisor and, due to his defiance, had no alternative but to take disciplinary action (Tr. 799).

After the meeting, Williams, Allen and Calhoun went back to the yard for Calhoun to continue his pre-trip inspection. He continued his inspection in the same manner as before, touching lug nuts, handling hoses and wiping down the interior of the cab after being told not to (Tr. 800). Allen stopped him again and asked him to step down from the cab. Allen opined that Calhoun was being rebellious, at which point Allen sent him home with a one-day suspension (Tr. 801).

I find that Calhoun has established a prima facie case that he was suspended because he engaged in protected activity on June 28, 2001.

d. Has Calhoun established a prima facie case of discrimination on June 29, 2001?

(i). Did Calhoun engage in protected activity?

On June 29, 2001, Allen completed yet another work audit of Calhoun. Allen opined that Calhoun seemed to improve slightly in his hand-checking of parts. However, as if to compensate for not touching things, he spent more time on his scan (Tr. 802). Calhoun also began separating the doubles, at which point Allen stopped him. Calhoun became belligerent and insisted that he needed to check the coupling devices (Tr. 802-3). At the end of his start-work routine, Allen, Calhoun, Williams and Byron Tucker met regarding his one-day suspension. It was decided that he would be taken out of work for his next scheduled work day (Tr. 804). Calhoun was told that he needed to make some changes in his start-work routine to avoid further disciplinary action (Id.).

(ii). Did UPS take adverse action against Calhoun?

On June 29, 2001, Calhoun was taken out of work for the next day. Taking an employee out of work and docking his pay is an adverse employment action. See Von Gunten, supra; Calhoun, supra.

(iii). Did the adverse action result from Calhoun's protected activity?

Calhoun has established a causal connection between his protected activities on June 29, 2001 and his removal from work for the next day (Tr. 804). Thus, he has established a prima facie case of employment discrimination on June 29, 2001.

e. Has Calhoun established a prima facie case of discrimination on July 5, 2001?

(i). Did Calhoun engage in protected activity?

On July 5, 2001, Allen once again accompanied Calhoun during his pre-trip inspection of his vehicle (Tr. 133). Calhoun noticed an oil deficiency in the glad hands (Tr. 137-9). On July 6, 2001, Tom Hope, a shop steward, also participated in the pre-trip inspection (Tr. 141). Calhoun noticed that there was a problem maintaining air pressure at 120 pounds. The pressure seemed to fluctuate between 75 and 95 pounds, which could indicate a number of problems such as a leak in the spitter valve or a seal problem in the glad rings (Tr. 142-3). The truck was taken to the shop and the leak fixed.

Calhoun did not think that he had completed a proper inspection and felt rushed through it by Allen and Hope (Tr. 145). Allen stayed right next to Calhoun the entire time and gave him no space in which to move. Allen seemed antagonistic and almost hateful when speaking to Calhoun and, despite the air pressure not reaching the correct number, told him to leave the yard anyway (Tr. 514-5). Allen pressured Calhoun to hurry through the pre-trip inspection (Tr. 532-6).

Calhoun refused to drive on this date, at least in part, because of a defect in the brake system. His refusal to drive until the brake system was repaired is protected activity.

However, Allen testified that Calhoun began adding additional things to his routine as if to compensate for not touching parts (Tr. 807). Calhoun's behavior in increasing his start-work times by exaggerating his inspections was not related to any reasonable safety concern, and, thus, is not protected activity.

(ii). Did UPS take adverse action against Calhoun?

Allen prepared a "start-work audit" concerning Calhoun's July 5, 2001 inspection (Tr. 134-5; JX-48, D-000563). The report indicated that Calhoun did not perform a proper inspection because he turned off the air on the trailer to check the seals on the brake lines (Tr. 805-06). Calhoun has not presented evidence that the start-work audit affected his pay or promotion potential within or outside of UPS. Therefore, I find that

the start-work audit does not constitute adverse action. See Calhoun, supra. Thus, Calhoun has not established a prima facie case of discrimination on July 5, 2001.

f. Has Calhoun established a prima facie case of discrimination on July 10, 2001?

(i). Did Calhoun engage in protected activity?

On July 10, 2001, Allen noted in his report that Calhoun was “purposefully over exaggerating his inspections. He had no sense of urgency about running the schedule or his departure time” (Tr. 811). He did not believe in the UPS pre-trip inspection method and was going to check what he deemed necessary anyway (Tr. 821).

Calhoun was supposed to move around the truck and not slow down to check anything unless he heard an air leak (Tr. 147). He stopped to look under the cab door area and again to look under the rear of the truck (Tr. 151). He also drained all the air off the dolly, which UPS deemed not to be necessary and rubbed his hands up and down the brake lines (Tr. 153-4). He tried to hurry through his inspection and later found that he had missed a bad knot on the short red line (Tr. 155).

Calhoun has not established that looking under the cab door area of his truck was based on a reasonable belief that there was any violation of a safety regulation. Nor has he established that he would have violated a safety regulation had he not drained the air off of the dolly. However, Calhoun did manually inspect brake hoses on this date, and I find that manual inspection of brake hoses is protected activity. Therefore, Calhoun has established that at least some of his pre-trip inspection activities on July 10, 2001 were protected activities.

(ii). Did UPS take adverse action against Calhoun?

On July 18, 2001, Calhoun was given a three-day suspension for not scanning properly during his July 10, 2001 vehicle inspection (Tr. 146-7, 674; JX-52). A suspension without pay is an adverse employment action. See Von Gunten, supra; Calhoun, supra.

(iii). Did the adverse action result from Calhoun's protected activity?

Calhoun engaged in protected activity when he manually inspected brake lines. 49 CFR 392.7. He was subsequently suspended for three days. I find that there is a causal connection between Calhoun's protected activity and the adverse employment action. He has established a prima facie case of employment discrimination on July 10, 2001.

g. Has Calhoun established a prima facie case of discrimination on September 6, 2001?

(i). Did Calhoun engage in protected activity?

Allen accompanied Calhoun during his September 6, 2001 vehicle inspection (Tr. 818). Calhoun touched lug nuts during the inspection (Tr. 820). He told Allen that the fifth wheel needed grease, but Allen instructed him that it did not need grease (Tr.

820). During the inspection, Calhoun dropped to one knee at the rear of the dolly to inspect parts, including the brakes (Tr. 156-7). He observed that the dolly brakes were out of adjustment because the brake lining and drum did not match up (Tr. 157-8). Calhoun put the set together and performed the UPS brake test twice (Tr. 158). Calhoun told Allen that he wanted to have the dolly brake checked at the UPS shop because it did not look right. Allen told Calhoun that the brake test "felt okay" and that he needed to "move on" (Tr. 159, 883).

When Calhoun arrived in Carnesville, Georgia, he performed his preferred brake test, which revealed that the brakes were not working properly (Tr. 162-3). That same day, the UPS vendor in Carnesville had to adjust a brake on the dolly with a two-foot long bar because the brakes were locked up due to rust. The vendor told Calhoun that the brake drum was completely rusted (Tr. 165).

Calhoun engaged in protected activity when he inspected the brakes on his trailer. 49 CFR 392.7. Allen's instructions to disregard his concerns about the brakes, which brakes turned out to be in non-working order, prevented Calhoun from taking reasonable steps to assure himself of the safety of his vehicle when he had reason to believe that the brakes were not in working order. That the brakes were later proved to be defective only reinforces the reasonableness of Calhoun's brake inspection on this particular day.

(ii). Did UPS take adverse action against Calhoun?

Despite finding a problem, Calhoun was terminated on September 7, 2001 for once again failing to comply with UPS inspection methods (Tr. 162-8). He was called to a meeting with Allen, Williams, and Wolfe. Allen told Calhoun that he would be terminated for dropping to his knee and inspecting the dolly brakes (Tr. 167). Calhoun told Wolfe that he had brake problems with a dolly brake the previous day and that the vendor in Carnesville had had to adjust the brakes (Tr. 166). He also explained that the brake drum was rusted. Calhoun told Wolfe that he did not have any brakes on one dolly wheel during his trip to Carnesville (Tr. 167-8).

I find that Calhoun's termination on September 7, 2001 was adverse employment action. Assistant Sec'y & Brown v. Besco Steel Supply, 93-STA-30 (Sec'y Jan. 24, 1995); Calhoun, supra.

(iii). Did the adverse action result from Calhoun's protected activity?

Calhoun has established that his September 7, 2001 termination was as a result of his inspection of the dolly brakes (Tr. 162-8). Because I find that his inspection of the dolly brakes was reasonable, I find that Calhoun has established that his termination was because of protected activity. Thus, he has established a prima facie case of discrimination for September 7, 2001.

h. Has Calhoun established a prima facie case of discrimination on October 30, 2001?

When he arrived at work on October 30, 2001, he found his doubles that were to be attached, but the rear trailer doors were open and still being loaded (Tr. 171). He pulled the trailers apart to check the dolly and put them back together after finding nothing wrong with them. Allen came out of his office and asked Calhoun to come in for a meeting (Tr. 172-3). Allen asked Calhoun why he separated his doubles and reassembled them (Tr. 173, 822). Calhoun answered that that was the only way he could check everything (Tr. 174). Calhoun was told not to separate the doubles after they had been built and was discharged (Tr. 822-4).

Calhoun has not established that he engaged in protected activity on October 30, 2001. Separating pre-assembled doubles without a specific indication that there was a safety-related problem has not been shown to be reasonable.

i. Has Calhoun established a prima facie case of discrimination on May 7, 2002?

Calhoun pulled apart a set of pre-assembled doubles on May 7, 2002 (Tr. 190-1, 684). Wolfe and Sherman observed Calhoun do so (Tr. 192-3). Calhoun did not complete any other components of the pre-trip inspection. As explained above, I find that separating pre-assembled doubles without a specific indication of a safety-related problem is not reasonable behavior under 49 CFR 392.7 and 396.13.

Calhoun testified that he pulled the trailers apart on May 7, 2002 even though he had no specific reason for doing so (Tr. 400-1). Pulling apart the pre-built doubles absent a specific indication that it is necessary is not reasonable. Because this is the only part of the pre-trip inspection which Calhoun carried out on May 7, 2002, I find that he did not engage in protected activity on this day.

B. Did Calhoun engage in protected activity under the "complaint" clause, 49 USC 31105(a)(1)(A)?

Under 49 USC 31105(a)(1)(A), Calhoun may establish that he engaged in protected activity if he proves that he complained about a violation of a safety regulation and that UPS took adverse action against him because of his complaint. 49 USC 31105(a)(1)(A); Clement v. Milwaukee Transp. Servs., Inc., ARB No. 02-025, at 6 (Adm. Rev. Bd. 2003). Calhoun must establish that he conveyed a reasonable belief that UPS was engaging in a violation of a motor vehicle safety regulation. Leach v. Basin Western, Inc., ARB No. 02-089, at 3 (Adm. Rev. Bd. 2003) ("Under the complaint clause, it is necessary that the complainant at least be acting on a reasonable belief regarding the existence of a violation."); Harrison v. Roadway Express, Inc., ARB No. 00-048, at 5 (Adm. Rev. Bd. 2002).

Internal complaints to management officials are protected under the act. See Schulman v. Clean Harbors Environmental Servs., Inc., 98-STA-24 (Adm. Rev. Bd. 1999). A complaint to any supervisor, no matter where that supervisor falls in the chain

of command, can be protected activity. See, e.g., Hufstetler v. Roadway Express, 85-STA-8 (1986), aff'd, Roadway Express, Inc. v. Brock, 830 F.2d 179 (11th Cir. 1987).

UPS does not dispute that Calhoun repeatedly expressed his belief that sections 392.7 and 396.13 permitted him to conduct the vehicle inspection routine of his choice and that UPS's efforts to curtail his inspections were a violation of these provisions (Employer's post-hearing brief at 65). However, UPS argues that Calhoun's complaints about his freedom to conduct pre-trip inspections were not based on a reasonable belief that the company was in violation of a motor vehicle safety regulation.

I find that Calhoun's inspections in the face of instructions to adhere simply to the UPS inspection regimen and his well-documented displeasure with the UPS inspection regimen constitute protected complaints under the act. As discussed above, some aspects of Calhoun's pre-trip inspections were reasonable, and, thus, protected activity, even when he exceeded the standard UPS inspection regimen. Therefore, he has established that his complaints to management officials were based on a reasonable belief that UPS was in violation of motor vehicle safety regulations 49 CFR 392.7 and 49 CFR 396.13. Thus, I find that Calhoun's inspections on June 26, 2001, June 28, 2001, June 29, 2001, July 10, 2001, and September 6, 2001, which inspections I have found to be protected under the "refusal to drive" clause, are also protected under the "complaint" clause.

III. Can UPS offer a legitimate non-retaliatory explanation for the adverse employment action?

Calhoun has established a prima facie case that he engaged in protected activity and was subject to retaliatory action by UPS on June 26, 2001, June 28, 2001, June 29, 2001, July 10, 2001, and September 6, 2001. In order to avoid liability under the act, UPS must articulate a legitimate, non-discriminatory reason for the adverse employment action on those dates. Moon v. Transp. Drivers, Inc., 836 F.2d 226, 229 (6th Cir. 1987). If UPS can articulate a legitimate reason for the adverse employment action, Calhoun must then prove that UPS's reasons are a pretext for retaliation. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993).

UPS has alleged that Calhoun was disciplined for insubordination. The alleged insubordination was Calhoun's insistence on performing certain inspections which exceeded the standard inspection (See generally, testimony of Don Allen at Tr. 724-801). Disciplinary action in response to employee insubordination can be a legitimate employment action. See e.g., Logan v. United Parcel Service, 96-STA-2 (ARB Dec. 19, 1996). However, because I have found that Calhoun's pre-trip inspections on the dates in question were reasonable despite exceeding UPS's standard inspection routine, the allegation of insubordination falls flat. The insubordination alleged is the very activity which I have found to be protected under the act. Although Calhoun may have engaged in heated exchanges with his supervisors over the scope of his pre-trip inspections, those exchanges are indistinguishable from the underlying protected inspections. Furthermore, unlike the complainant in Logan, supra, Calhoun's insubordination was not beyond the pale. There is no evidence that he acted inappropriately toward or

threatened any supervisors or fellow employees. Thus, I find that insubordination is not a legitimate, non-retaliatory explanation for the adverse employment actions taken on June 26, 2001, June 28, 2001, June 29, 2001, July 10, 2001, and September 6, 2001.

On three dates, June 26, June 28, and July 10, 2001, Calhoun engaged in some protected activity and some unprotected activity. Under a dual motive analysis, UPS can refute Calhoun's prima facie case of discrimination only by demonstrating that it would have taken the same adverse employment action in the absence of Calhoun's protected activities. However, UPS has not so demonstrated.

UPS has not shown that the one-day suspension issued to Calhoun on June 26, 2001 would have been issued if Calhoun had only wiped down the interior of his truck cab. In fact, Calhoun's supervisors specifically identified Calhoun's protected activity (touching the steering components and lug nuts, checking the brakes, grabbing hoses in the engine compartment) as the reason for the suspension (Tr. 118-20, 788-90).

Calhoun's suspension on June 28, 2001 occurred after he engaged in protected and unprotected activities. Don Allen's testimony confirms that the warning letter was issued to Calhoun in part because Calhoun was touching lug nuts on the wheels of his trailer (Tr. 578-9). There is no evidence that Calhoun would have been suspended for only cleaning the cab of his truck.

Finally, UPS has not demonstrated that three-day suspension Calhoun received for "not scanning properly" on July 10, 2001 (JX 52) would have been issued in the absence of Calhoun's protected manual inspection of the brake air lines. Thus, while Calhoun engaged in some unprotected activities such as looking under the door of his truck cab, UPS has not met its burden in establishing that Calhoun would have been disciplined for those unprotected activities alone.

Because UPS has failed to establish that Calhoun was disciplined for legitimate, non-retaliatory reasons, Calhoun has proved his claim of employment discrimination and is entitled to damages.

IV. Damages

Having found that UPS punished Calhoun for engaging in protected activity, I will now consider the remedy to which Calhoun is entitled. Under 49 USC 31105(b)(3)(A), administrative law judges may order an appropriate remedy, including abatement of the adverse action, reinstatement of the employee, or awarding compensatory damages, including back pay. Because of the circumstances of the case, including the fact that Calhoun has retired, I find that the appropriate remedy is an award of back pay and compensatory damages for emotional distress. I will also grant Calhoun's request that UPS be ordered to post a copy of my recommended decision and order and of the final decision and order in this case be posted in prominent places in all UPS terminals for sixty days.

A. Back Pay

I find that Calhoun is entitled to damages for pay lost as a result of the adverse employment actions taken by UPS. Calhoun is entitled to lost wages for his one-day suspension issued on June 26, 2001. He is also entitled to two days' lost wages for the one-day suspension issued on June 28, 2001 and for being placed on out-of-work status on June 29, 2001. He is further entitled to three days' lost wages for the three-day suspension issued on July 18, 2001 and for any wages lost as a result of his September 6, 2001 termination. However, he is not entitled to damages for the adverse employment actions on October 30, 2001, and May 7, 2002 because he failed to make a prima facie showing that his termination on those dates were related to any activities protected under the act.

B. Emotional Distress

In Michaud v. BSP Transport, Inc., 95-STA-29 (ARB Oct. 9, 1997), the ARB held that the common meaning of compensatory damages includes back wages as well as damages for pain and suffering, mental anguish, embarrassment, and humiliation. In Dutkiewicz v. Clean Harbors Environmental Services, Inc., 95-STA-34 (ARB Aug. 8, 1997), the complainant was awarded compensatory damages where there was uncontradicted evidence that he experienced severe emotional distress proximately caused by his unlawful discharge. In seeking an award for compensatory damages, a complainant need not present medical or psychological evidence to prevail. Busche v. Burkee, 649 F.2d 509, 519 n.2 (7th Cir. 1981).

Having observed and listened to Beverly Calhoun for seven days in 1999 and 2003, I have no doubt whatever that he suffered emotional distress as a result of retaliatory actions which I have found to be actionable (Tr. 289-92). He saw a psychologist for treatment of his emotional distress (Id.). Further, his emotional distress is undisputed. Based on a review of other cases in which emotional damages have been awarded to successful whistleblower complainants, I find that it is appropriate to award some emotional damages to Calhoun. See e.g., Hillis v. Knochel Bros., Inc., 2002-STA-50 (ALJ July 21, 2003); Roberts v. Marshall Durbin Co., 2002-STA-35 (Mar. 6, 2003); Dutkiewicz v. Clean Harbors Environmental Services, Inc., 95-STA-34 (ALJ Apr. 14, 1997); Assistant Sec'y & Bingham v. Guaranteed Overnight Delivery, ARB No. 96-108 (ARB Sept. 5, 1996) and cases cited therein. However, this case does not compel an award of a significant amount for emotional damages. The retaliatory actions by UPS were not as egregious as those taken by some employers. Neither was the evidence of emotional damage in this case as extensive as in other cases. Finally, I found that only a portion of UPS's actions alleged by Calhoun to be unlawful were retaliatory. Thus, I find that an award of \$2000 for emotional damages is appropriate.

RECOMMENDED ORDER

It is hereby recommended that the Department order the following:

1. UPS shall pay Calhoun damages equal to the amount of wages and benefits he would have received for the six days for which he was suspended without pay following his suspensions on June 26, June 28, and July 6, 2001.
2. UPS shall pay Calhoun damages equal to the amount of wages and benefits he would have received for any days for which he was suspended without pay following his termination on September 6, 2001.
3. Employer shall pay interest at the applicable federal rate, computed from the date on which the wages and benefits would have been paid.
4. Employer shall pay directly to Complainant the sum of \$2000 for emotional distress caused Complainant by Employer's unlawful retaliation.
5. Employer shall post copies of my recommended decision and order and of the final decision and order in this case in prominent places on the premises of all UPS terminals for sixty days and shall ensure that such copies are not removed or covered.
6. All of Complainant's other requests for remedies are DENIED.

A

FLETCHER E. CAMPBELL, JR.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington D.C. 20210. See 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996)